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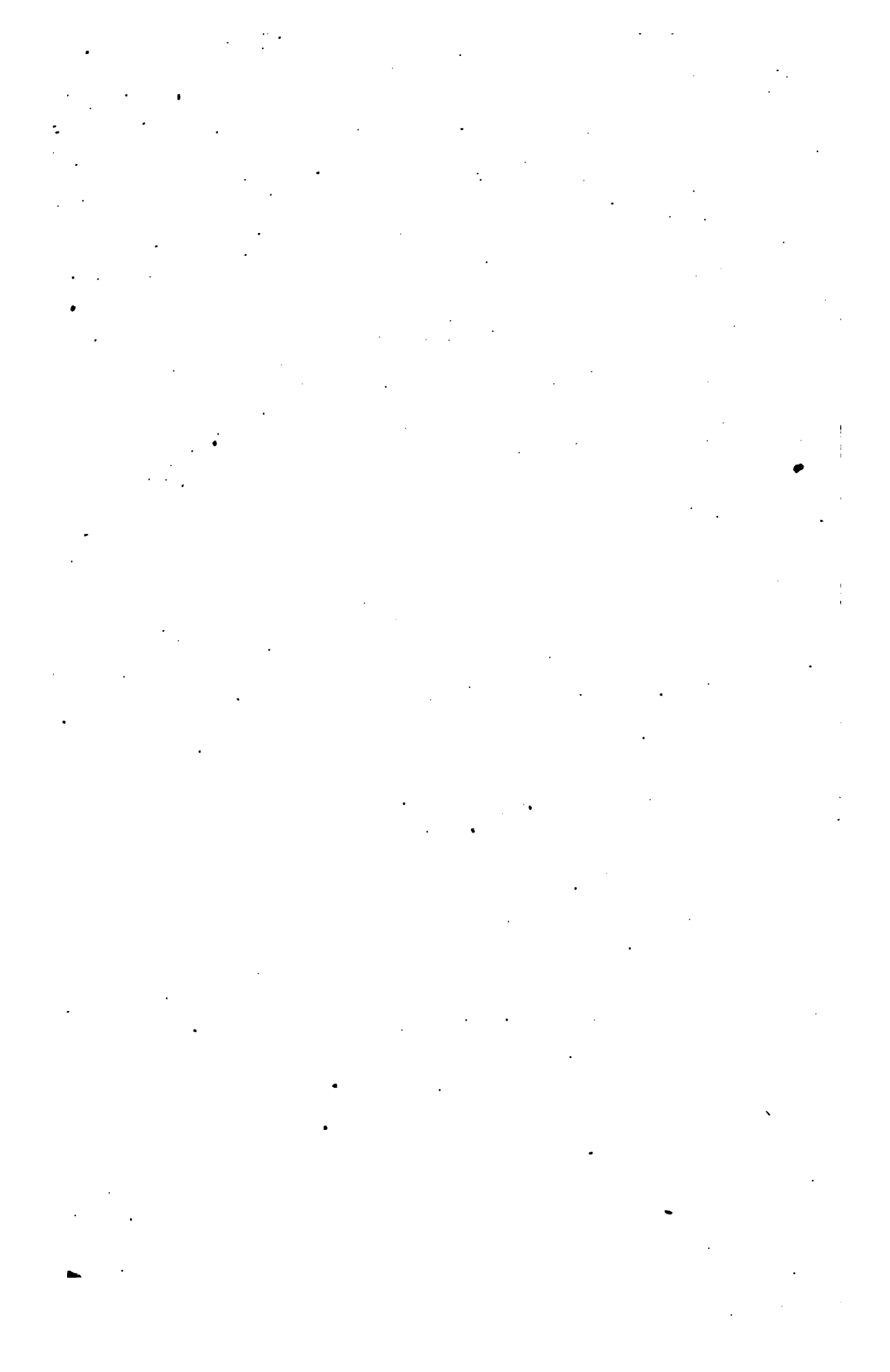
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WRITER TO THE SIGNET
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EDINBURGH, *November* 1866.

TABLE OF CONTENTS.

	PAGE
LIST OF REFERENCES AND ABBREVIATIONS, ...	xv
INTRODUCTORY LECTURE, ...	1

BRANCH I.

DEEDS IN GENERAL.

TITLE I.—SOLEMNITIES IN THE EXECUTION OF DEEDS, ...	23
Chapter I. Deeds by Private Parties, ...	23
II. Subscription by Parties who can write—by Notary or Notaries when Party cannot write—by or on behalf of Blind Persons—by Initials—Signing by a Mark, ...	34
III. Witnesses' Attestations—Designation of Writer—Specifi- cation of number of pages—Pagination—Place and Date of signing—Deeds executed on Sunday, ...	47
IV. Authentication of Alterations on Deeds—Erasures—Dele- tions—Interlineations—Marginal Additions, ...	62
 TITLE II.—PRIVILEGED WRITINGS, ...	73
Chapter I. Holograph Writings, ...	73
II. Testamentary Writings, ...	78
III. Foreign Deeds, ...	83
IV. Writings in <i>re mercatorid</i> —Special Statutory Forms of Authentication—Authentication of Judges' Interlocu- tors, etc., ...	90

	PAGE
TITLE III.—DELIVERY AND ACCEPTANCE, ...	95
TITLE IV.—INCAPACITATED PERSONS, ...	107
Chapter I. Imperfect Age, ...	107
II. Unsoundness of Mind, ...	117
III. Married Women, ...	122
IV. Deaf and Dumb Persons—Interdiction—Intoxication— Attainder and Outlawry—Aliens, ...	129
TITLE V.—UNLAWFUL CONSIDERATION, AND UNLAWFUL SUBJECT-MATTER. Bonds granted for Immoral Purposes—Domestic Relations —Restraints on Liberty of the Person—Freedom of election to Offices or Places of Trust—Buying and Sell- ing Offices of Public Trust—Simony—Revenue Laws —Smuggling—Gaming—Wagers—Usury— <i>Pactum de</i> <i>hereditate viventis</i> —Purchase by Agents or Trustees— Buying the Subject of Depending Process— <i>Pactum de</i> <i>quotâ litis</i> —Miscellaneous Professional Cases, ...	136
TITLE VI.—THE OPERATION OF ERROR, FRAUD, FORCE, AND FEAR IN REFERENCE TO THE EXECUTION OF DEEDS, ...	156
Chapter I. Error, ...	156
II. Fraud—by Collusion, Concealment, Misrepresentation, and Circumvention, ...	159
III. Statutes striking at Deeds by Debtors in defraud of their Creditors—Attempted Preferences in Sequestrations, ...	167
IV. Force and Fear, ...	175
TITLE VII.—HOMOLOGATION AND <i>Rei Interventus</i> , ...	178
Chapter I. Homologation—Adoption, ...	178
II. <i>Rei Interventus</i> , ...	183
TITLE VIII.—THE STAMP-LAWS, ...	188
TITLE IX.—THE CLAUSES COMMON TO MOST DEEDS, AND RULES AS TO THE EFFECT OF BLANKS IN WRITS, ...	200
Chapter I. Narrative Clause, ...	200
II. Warrantice Clause, ...	203
III. Clause of Registration for Preservation and Execution— Records, ...	209
IV. Testing Clause, ...	221
V. Blanks in Writs, ...	226

CONTENTS.

ix

BRANCH II.

DEEDS RELATING TO PERSONAL RIGHTS.

	PAGE
TITLE I.—THE PERSONAL BOND,	231
Chapter I. Clauses of Personal Bond—Order of Liability among Heirs,	231
II. Bonds by two or more Obligants,	247
III. Cash-credit Bonds—Bonds of Annuity,	253
IV. Bonds of Caution—Bonds of Corroboration,	260
 TITLE II.—ASSIGNATION OF PERSONAL OBLIGATIONS,	280
Chapter I. Old and New Forms, and Clauses of Assignment,	280
II. Intimation of Assignment,	291
III. Assignment of Policy of Assurance—Transfer of Bank Stock, etc.—Legacies or Reversionary Interests— Patents—Copyrights—What Subjects cannot be as- signed—Assignations in Security,	307
 TITLE III.—EXTINCTION OF OBLIGATIONS,	320
Chapter I. Discharges,	320
II. Confusion—Novation—Delegation—Negative Prescrip- tion—Taciturnity,	333
III. Discharge of Cautioners—Discharge and Assignment,	338
 TITLE IV.—PERSONAL CONTRACTS OTHER THAN THE CONTRACT OF MARRIAGE,	344
Chapter I. The Indenture,	344
II. The Submission and Decree-Arbitral,	348
III. The Contract of Copartnery,	372
IV. Joint-Stock Companies,	388
 TITLE V.—MOVEABLE REAL RIGHTS—MARITIME WRITS—BONDS OF BOTTOMRY AND RESPONDENTIA—CHARTER-PARTY,	408
 TITLE VI.—THE FACTORY AND COMMISSION,	418
 TITLE VII.—BILLS AND PROMISSORY-NOTES,	427
Chapter I. Form—Authentication—Subject-matter,	427
II. Acceptance,	445
III. Transference by Delivery—by Indorsation—Liabilities of Parties,	449

	PAGE
Chapter IV. Negotiation, ...	459
V. Notarial Protest, ...	465
VI. Erasures or Alterations, ...	472
VII. Prescription, ...	477
VIII. Donations by Indorsation—Drafts or Cheques on Bankers, ...	486
 TITLE VIII.—ENFORCEMENT OF OBLIGATIONS, ...	 491
Chapter I. Diligence—History of Imprisonment for Debt—Horning—Caption, ...	491
II. Personal Diligence Act, 1838—Court of Exchequer Act, 1856, ...	500
III. Personal Poining—Arrestment and Furthcoming, ...	512

BRANCH III.

DEEDS RELATING TO HERITABLE RIGHTS.

TITLE I.—THE CONSTITUTION OF AN ORIGINAL FEUDAL ESTATE, ...	526
Chapter I. Sketch of Feudal System in Scotland, ...	526
II. Proper Investiture— <i>Breve Testatum</i> —Improper Investiture—Old and Modern Forms of Charter—Clauses—Description of Lands, ...	541
III. Qualifications of Dispositive Clause—Limitations of Vassal's Rights—Conditions of Feu—Limitations of Superior's Rights—Casualties of Superiority, ...	570
IV. Clauses of Charter continued, ...	589
V. Instrument of Sasine in Old Form— <i>Sasines propriis manibus</i> , ...	604
VI. Registration of Instruments of Sasine—Registers—Modern Form of Instrument—Registration under Titles to Land Acts, ...	618
 TITLE II.—VOLUNTARY TRANSMISSION OF A PREVIOUSLY CONSTITUTED FEUDAL ESTATE, ...	 638
Chapter I. The Disposition—Alternative Manner of Holding—Clauses, ...	638
II. Missives of Sale—Minute of Sale—Progress of Titles—Search for Incumbrances—Articles of Roup, ...	647

CONTENTS.

xi

	PAGE
Chapter III. Completion of Purchaser's Title—Charter of Confirmation —Charter of Resignation—Charter of Resignation and Confirmation—Writ of Confirmation—Writ of Resigna- tion, ...	679
IV. Disposition of Superiority—Crown Charter, ...	700
V. Disposition and Assignment—Assignment of Conveyances under Titles to Land Act of 1858—Completion of Grantee's Title, ...	706
VI. Consolidation of Property and Superiority—Resignation <i>ad remanentiam</i> —Sopited Superiority—Forfeiture and Relinquishment of Superiority, ...	718
VII. Burgage Tenure—Tenure of 'Booking' in Paisley, ...	736
 TITLE III.—JUDICIAL TRANSMISSION OF LAND, ...	 744
Chapter I. Trust-disposition for Creditors—Deed of Accession by Creditors, ...	744
II. Sequestration, ...	751
III. Adjudication in Implement, ...	759
IV. Judicial Sale—Cognition and Sale—Judicial Sale by Apparent Heir—Division and Sale, ...	767

BRANCH IV.

DEEDS GENERALLY RELATING TO BOTH PERSONAL AND HERITABLE ESTATE, AND OTHER DEEDS NOT FALLING UNDER ANY OF THE FOREGOING BRANCHES.

TITLE I.—FORMS OF DESTINATION.

Conjunct Rights to Husband and Wife ; to Parent and Child ; to Third Parties—Institute—Heir—Conditional Institute—Substitute, ...	776
---	-----

TITLE II.—CONTRACTS OF MARRIAGE AND BONDS OF PROVISION, ... 792

Chapter I. Legal Rights of Spouses and Children— <i>Jus Mariti</i> —Right of Administration—Courtesy—Terce—Service and Ken- ning to Terce—Communion of Goods— <i>Jus Relictæ</i> —	
--	--

	PAGE
<i>Legitim</i> —Dead's Part—Antenuptial Contract of Marriage—Provisions by Husband to his Wife and Children—Discharge of Legal Provisions—Provisions by Wife—Marriage Trusts—Postnuptial Contract of Marriage,	792
Chapter II. Bonds of Provision to Wife and Children,	852
 TITLE III.—TESTAMENTARY WRITINGS,	860
Chapter I. Intestate Succession among Collaterals and Ascendants—Collation—The Testament—Disposition and Settlement—General Disposition and Settlement—Completion of General Dispositive's Title—Trust—Disposition and Settlement—Revocation of prior Deeds—Codicils,	860
II. Legacies,	909
III. Completion of Title by Trustees and Judicial Factors—Declaratory Adjudication—Termination of Trust,	925
 TITLE IV.—ENTAILS AND DISENTAILS, .	934
Chapter I. Entails, Old and New, .	934
II. Entails, how brought to an end—Disentails—Consequences of Contravention of Prohibitions, .	967
III. Trust-Deeds connected with Entails—Statutory Powers to grant Provisions to Wives, Husbands, and Children; to sell Land; to Excamb; to grant Feus and Leases; to burden—Permanent Improvements, .	974
 TITLE V.—TRANSMISSION OF ESTATE, HERITABLE OR MOVEABLE, FROM THE DEAD TO THE LIVING, .	991
Chapter I. Different Classes of Heirs—Heir of line—Heir of conquest—Heirs-portioners—Heir-male—Heir-male of the Body—Heir-female—Heirs whatsoever, .	991
II. Completion of Heir's Title—Entry with Crown—Special Service—Chancery Precept—General Service—Crown Writ of <i>Clare Constat</i> —Entry with Subject-Superiors—Trust-bond and Adjudication—Cognition and Sasine—Writ of <i>Clare Constat</i> in Burgage Lands, .	998
III. Confirmation of Executors, .	1031
 TITLE VI.—ENTRY OF VASSALS.	
Superior's Title—Accretion—Heirs-portioners in Superiority—Liferenter by Constitution; by Reservation—Entry-money due by Heir—Tailzied Investiture—	

CONTENTS.

. xiii

PAGE

Assignable Charter—Action of Non-Entry—Charter to Corporation; to Trustees—Composition due by Singular Successor—Novodamus, ...	1051
---	------

TITLE VII.—HERITABLE SECURITIES, ...	1061
--	------

Chapter I. Real Burden; by Reservation; by Constitution—Ground-Annuals—Bond and Disposition in Security—Cash-credit Bond—Disposition with Back-Bond—Security by Heir of Entail; by Heir-apparent—Old Form of Bond, ...	1061
--	------

II. Transmission of Securities—Assignment—Writ of Acknowledgment—Extinction and Restriction of Securities, ...	1085
--	------

TITLE VIII.—REAL DILIGENCE, ...	1092
---------------------------------------	------

Inhibition—Adjudication—Poinding the Ground, ...	1092
--	------

TITLE IX.—LEASES, ...	1101
-----------------------------	------

Agricultural, Building, and Mineral Leases—Sub-Lease—Assignment of Lease—Renunciation of Lease, ...	1101
---	------

INDEX, ...	1117
------------------	------

INDEX OF STATUTES, ...	1247
------------------------------	------

INDEX OF CASES, ...	1254
---------------------------	------

LIST OF REFERENCES AND ABBREVIATIONS.

- Alexander's Practice of the Commissary Courts in Scotland, 1859.
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INTRODUCTORY LECTURE.

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THE province of the Chair of Conveyancing is to impart a scientific and practical acquaintance with the Scottish system of deeds,—that is, of the writings by which in this country obligations and rights are constituted and perfected,—to explain their origin and history, their styles or forms, their peculiarities of adaptation to particular circumstances, the solemnities of their execution, and the requisites to their efficacy after being completed in point of form.

Conveyancing necessarily occupies a large place in the study of every member of the legal profession ; for as, on the one hand, the accomplished lawyer must be a master in Conveyancing, and able when called on to guide and direct the practical Conveyancer,—so, on the other, the skilful practitioner must possess an extensive and accurate knowledge of the law, and be able readily to perceive the points of importance or of difficulty connected with deeds, and to frame deeds or clauses fitted validly to secure the accomplishment of their special purposes.

The department of the Conveyancer is very comprehensive, embracing transactions the most varied, and interests the most important. The buyer and seller of land, borrower and lender of money, the landlord and tenant, the parties to the marriage contract, the entailor and disentailor, testators in their wills, heirs on their succession—all rely upon the Conveyancer. And whether we regard the interests of the community at large, the importance of high professional attainments in our Conveyancers, or the severe sanction under which in general their duties are undertaken, we cannot but feel that there is urgent need of thorough and anxious training in the theory and practice of our system ; for it is essential to the comfort and wellbeing of society that the community shall be able to depend implicitly on the safety of the interests intrusted to the Conveyancer, which in not a few cases involve all the worldly possessions of his clients, or interests more dear than worldly possessions.

I will not here touch on the general education of the Conveyancer, further than to say that it is necessarily large and liberal, and that, the more he has learned well, he will be the better fitted for his peculiar and varied duties. Our greatest Conveyancers have been men of high accomplishments.

¹ The first part of this Lecture was delivered by Professor Bell on his appointment to the Chair of Conveyancing in 1856. The latter part of the Lecture was delivered at the commencement of most of the subsequent sessions.

Nor will I enter upon the subject of his strictly professional training, the objects of which I have already indicated. It embraces a large field. Perhaps it is not all so attractive to the young mind as some other studies appear. But there is no student in Conveyancing who may not, in the training for his own profession, lay the foundation of a life of usefulness and honour.

I proceed at once to a short and general view of our System of Deeds.

In every such system the object to be attained is security of title, towards which I apprehend simplicity, if not essential, is mainly auxiliary, for with that there will of necessity be distinctness and facility of adaptation to different circumstances.

The rights we have to deal with are divided into two great classes—personal or moveable, and real or heritable; the former relating chiefly to money and effects, the latter chiefly to lands.

With regard to Personal Rights our system is very simple, and nothing can be more complete than the security of title afforded by our customary forms and procedure. In illustration of this, I will cite the Personal Bond, with the transmission of it. The bond opens with an acknowledgment of the receipt of a sum of money in loan, in respect whereof the borrower binds himself to repay the like sum, at a specified time and place, with interest, and penalty in case of non-payment. It then contains a consent to registration or enrolment in the books of a court of justice for preservation or execution, so as to warrant (if necessary) summary proceedings, under the authority of the court, against the borrower's person and estate for recovery or security of the debt; and concludes with what is common to all our deeds, the clause of attestation, consisting of statutory or customary solemnities and requisites, having for their object to render the deed of itself evidence that it is genuine, or, in technical language, 'probative.' The deed of transmission of the bond to a new creditor is equally simple. There are here three persons directly concerned: the original creditor or cedent, the new creditor or assignee, and the debtor. By this deed the original creditor, in consideration of a sum of money paid by the new creditor, or for other causes, assigns the debt and bond to the new creditor, with power to receive and discharge or transfer the debt; the assignation then recites the delivery of the bond to the new creditor, and concludes with clauses of registration and attestation. Intimation of the transmission is given in a simple form to the debtor, making him aware that the debt is now due to the assignee, which intimation divests the cedent and completes the assignee's right. But simple as these writs are in form, they involve the explanation of the solemnities requisite in the execution of all deeds; the branch of our law which relates to the registration of deeds for preservation and execution; the rights of discussion and relief among heirs; the law of warranty; and some reference to the laws lately existing against usury; and, when the structure of the simple personal bond and its transmission has been clearly explained, it will be found that great advance has been

made towards the understanding of a large class of personal rights of a more complex order.

With regard to Land Rights, we are now (subject to a few immaterial exceptions), as we have been for about eight centuries, governed by the rules of the feudal system,—an ‘inexhaustible reservoir of legal antiquities and learning,’ as Blackstone describes it; and ‘the Law of Nations in our Western Orb,’ as described by Spelman. In this department our deeds, in conjunction with our records and the law of prescription, afford the materials of complete security of title.

Under the feudal system, as is well known, the Sovereign is the source or fountain of all land rights in the kingdom. Those to whom the Sovereign has granted such rights hold of him, he being their superior or overlord, they his vassals. These Crown vassals, as they are styled, have given off, and are every day giving off to sub-vassals (relatively to whom they are superiors or overlords) portions of the lands which they themselves hold under the Crown. The sub-vassals give off subordinate rights to others as their vassals, and so on the granting of subaltern rights may go without any limit by law, though practically this power of subinfeudation does not produce any inconvenience.

The feudal system, with all its ancient rigour, was singularly adapted to the contemporary state of society and manners in this country; and this, together with the direct power of the feudal superiors, many of whom exercised all the rights of princes and judges within their territories, and with the various severe contingent rights, technically called casualties, attached to the right of superiority, may sufficiently account for its deep-rooted influence.

Our country during the period in question was the scene of much warfare and intestine commotion; and the feudal system was emphatically a military organization. The lands in general were held for military service; the Crown vassals were bound to the Sovereign, and when he was at war were under direct obligation, by the terms of their charters, to follow him with their dependants to the field. In like manner, when the Crown vassals were at feud with one another, their sub-vassals were bound by a similar obligation to accompany them; and so, without any standing army, there was embodied in the system of feudal tenures a force, after the fashion of the times, at command for the king’s wars, public commotions in the country, or frays or followings, as comparatively recent charters speak of. On the other hand, the vassals were entitled to protection from their superiors.

I have spoken of the obligations due by vassals to their superiors, and of these a lively picture is presented in the following stipulation contained in a charter granted in 1631, by the great Marquis, then the Earl, of Montrose. The vassal is ‘to ryde with the Earl in reasonable ‘good equipage as a gentleman three several times ilk year, to attend his ‘lordship at ilk time for the space of 48 hours, and also to ryde with ‘the Earl at all other occasions when required to such parts about the

‘ place of Mugdock (the old seat of the family), as they may come home
 ‘ at night to their own houses and no further.’ ‘ And sicklike to attend
 ‘ the Earl in time of the king’s warrs, and of trouble and insurrection in
 ‘ the country, and at frays and followings, and also to ryde with my Lord
 ‘ for help and defence of his Lordship, and his friends, their honour, lyfe,
 ‘ lands, goods, and gear.’

I noticed the severe nature of the casualties or contingent rights attached to superiorities; one of these was the casualty of marriage, which Professor Menzies in his Lectures most aptly describes as ‘an exaction singularly characteristic of the feudal age and manners;’ explaining that the superior had the privilege of choosing and offering a wife to his vassal, who, if he declined, was subjected to a heavier casualty. The Professor mentions that the Earl of Warwick, in the reign of Charles I., exercised his power as superior so as to extort from a lady vassal a fine of £10,000 for liberty to marry a husband in every way suitable.

The manner of proceeding in Scotland with a view to turn this casualty to good account, I find very plainly told in an instrument dated 14th November 1614, taken by the party in right of the casualty, and who was a nobleman, for himself and as acting for his own daughter, upon his offering his daughter to the vassal, who also was a nobleman, in marriage. The instrument recites that the vassal was required to compear personally within the requisitionist’s mansion, with such of his friends as he pleased, upon the 18th day of November then current—that is within four days—to see and confer with the lady and her father anent the marriage, and to treat anent all things necessary to be done before the solemnization thereof; but, that there might be no mistake or delay, the vassal was further required to compear personally in the lady’s parish kirk, one month after the previous meeting, viz., upon the 18th December then next—being a Sunday—before noon, and there to solemnize and complete the bond of matrimony with the said lady in face of Holy Kirk.

In the same category with this we may place those curious contracts for marriage alliances between great families, which were not rare. I find an indenture, dated in 1519, between two noble earls, who agreed that the apparent heir of the one should marry the eldest daughter of the other, failing her, the next eldest, and so forth, so long as the one should have a son, being heir, and the other a daughter. In another deed, executed in 1575, and which is called a Contract of Marriage, I find the parents with the children all parties,—the gentleman engaging to marry the lady, whom failing one sister, whom failing another,—and she to take him, whom failing one brother, whom failing another. And, in 1501, I find an obligation going so far as to engage for the intermarriage as long as the one party has a son and the other a daughter. In this case the principals were not parties, which the deed explains; for it stipulates that the ‘bairns’ shall complete the marriage as soon as they attain, the son fourteen, the daughter twelve, years of age.

The other side of the feudal relation—that is, the obligation of the superior to his vassal—was to afford protection, which was matter of course when there was a vassalage. But the value of the claim to protection was obviously of great importance, which is illustrated by documents called bonds of manrent, the very name of which is expressive. By these, in consideration of the protection to be afforded, the parties engaged that they and their friends and servants should ride and go with their selected patron in peace and war when required, and should serve him against all other parties, allegiance to the Crown only excepted.

The law gradually came to do what the superior or patron had done; but the protection afforded by the law was imperfect until a comparatively late period, as I have found receipts, dated only about 100 years ago, granted by a Highland chief, M'Gregor of Glengyle, at the head of Loch Katrine, to a laird whose lands lay between Dumbarton and Glasgow, undisguisedly for black-mail, that is, the tax paid in money for immunity from robbery or lifting of cattle. The receipts were in form just as those for any legal tax.

We have seen a nobleman in 1614 endeavouring to make the casualty of marriage find a husband or a portion for his daughter; and about the same time, in 1599, I find a Renfrewshire laird, and of that ilk, turning his vassalage to account in the bringing up of his boys. In feuing out lands, he bound his vassal, if required, to bring up for him, and each of his successors, one boy upon the vassal's expenses, in food and in clothing, from the time of the boy's weaning to his age of six years complete.

Truly, as Professor Menzies says, in his most able and interesting account of the origin and history of the feudal system, the system in its full detail must strikingly have displayed practices tending to selfish aggrandizement on the one hand, and physical and moral degradation on the other.

Looking, then, simply to the state of the country and the habits of the people, I think no one can wonder that in early times the feudal system had such influence, and was so long preserved in unbroken rigour. It was, indeed, several centuries ago modified, and has by successive steps been made subservient to the growing progress and requirements of society, without which it would have been intolerable. And happily the state of manners which it fostered is even more entirely matter of history than the state of the law. But the modifications of the law of our land rights have not touched the principles of the system. The theoretical and technical relation of superior and vassal throughout Scotland stands at this day in identically the same position as at its maturity.

The first great element of security in our system of deeds is exact precision as regards the mode of constituting and transmitting a feudal estate. In the constitution we must create a legal estate, or holding which had no existence before,—the granter or maker being the superior,

the receiver or holder the vassal. In creating it we must specify what the vassal is to hold—that is, the estate,—how it is to be held, and what duties the superior is to be entitled to claim from the holder, his vassal. These, in the ordinary course of transactions, will be an elusory duty when the real consideration is a price paid down, or a substantial feud-duty when the annual payment forms the real consideration in the transaction between the buyer and seller. In transmitting, we must carry forward the original estate, placing the new proprietor in the room and stead of the former holder, which being done, the constitution or transmission, whether to heirs or strangers, is complete.

The next element is the necessity for the publication of land rights in the national records. In the earlier ages of the system, when a grant of lands took place, there was a public investiture of the vassal by the superior, in presence of the *pares curiæ*,—being the previously existing vassals of the same superior,—a simple and natural mode of giving publicity to the transaction.

Such a ceremony, accompanied with possession, we can readily suppose to have been very ample as a title and evidence, in an age when such transactions were rare. Still more so afterwards when followed by written instruments prepared by public notaries, beginning in usual form with the solemn invocation of the Deity, and containing the record of the grant and investiture. But such titles came to be distrusted, and frauds were practised by the granting of successive rights to the same lands. To remedy that evil, and enable parties to know with whom they were in safety to deal, the registration of titles to lands, and of deeds of security affecting lands, was appointed by an Act of the Scottish Parliament in 1617, and the system of registration as at first established, though it has undergone several amendments in detail, and is still open to improvement, speaks for its own efficiency in the fact that it is substantially the same now as on its institution. Under that system a transfer constituted by deeds in due form is, after registration, complete against all subsequent acts and deeds, and remains defeasible by the act and deed of the former proprietor until registration. In like manner, securities constituted in due form of deed are complete as real and preferable rights, according to the date of their registration, and until registration they afford no more than personal claims. Registration is the test of preference. The records thus established, therefore, enable every one to know with certainty with whom he is safe to transact in the purchase of lands, or in making loans on landed security; and generally, it may be said that these records afford data for ascertaining the state of the rights to all the lands in the kingdom, and the extent and nature of every burden or encumbrance on each separate right in the land. No latent right not appearing on the records can affect a purchaser or heritable creditor; and thus the public are fully protected, for parties whose title or security is not on the record cannot object to the title of a purchaser or lender. The non-registration of their title throws them out of court.

These two elements—precision as to the system of deeds, and publication by means of the record—may at first sight appear all that we require for security. But it would be intolerably burdensome, and would open the door to many dangers, were it necessary, in support of the right to lands, always to trace back the titles to their beginning in a grant from the Crown. Writings are not imperishable, and through accident or carelessness, or other causes, they are frequently lost or destroyed. Our ancestors therefore fixed a period, beyond which (uninterrupted possession having been in the meantime enjoyed) it should not be necessary to go back in order to instruct an exclusive title to lands. This was done in the same Parliament which effectively introduced the Scotch system of registration—a Parliament to whose intelligent and prudent acts this country may well look back with gratitude and admiration. The period fixed for prescription was forty years. If, therefore, we can exhibit a title, or series of titles, constituted by deeds, correct in form, and founded on a sasine duly recorded, and on which there has been uninterrupted possession for the period of forty years, we have an exclusive right. No matter whether any, or what, defects may have existed prior to the forty years of such possession—the Statute of prescription absolutely stops all inquiry on that point, and so gives practical and complete efficacy to the system of deeds and records, and perfects the security of title thereby afforded.

And here I may observe, that the establishment of our registers for publication is a distinguishing feature of our national system, and so valuable and necessary, that, did we not see the want of similar records in England, and the difficulties interposed in the way of establishing an efficient system of records in that country, we should hardly be prepared to give our ancestors that credit for sagacity and firmness to which the institution of these records eminently entitles them.

It is a remarkable and very interesting fact, that in England, in 1617, the same year in which our system of records for publication was effectively introduced, an attempt was made, under Letters-patent which passed the Great Seal, Sir Francis Bacon being then Lord Keeper, to initiate, at least partially, a similar system. The patent tells how valuable such a system is, where it recites that the multiplicity of searches in various courts, offices, and places within the realm of England necessary to find out the charges and encumbrances prejudicial to purchasers of lands, or to creditors, had become so intricate and uncertain as to create great charge, trouble, and insecurity; and its object appears to have been the establishment, in the metropolis, of a central register where all necessary information as to such matters might be obtained. And the document is of importance as showing that, so early as the reign of James I. of England, the want of a general register for the convenience of search was severely felt. There had been previous Registration Acts in England, in 1535 and 1562, but their operation was very limited.

Having regard to what is expressed in the patent, we might natur-

ally have expected that, in a country like England, the want so much felt in Bacon's time would long ere now have been completely satisfied; but it is not so. The establishment of a general register in England,—though many times recommended by Committees of Parliament, and by the wisest and best lawyers of that great country, and though defective registers are described, in an Act passed in 1707 for the East Riding of Yorkshire, as leading to frauds, and causing whole families to be utterly ruined,—has not yet taken place; and the beneficial effects of our own system cannot be better illustrated than by contrasting it with that still pressing upon our countrymen in England, as shown in the following passage, which I quote from the first Report of the Royal Commissioners on Registration and Conveyancing, presented to Her Majesty on 1st July 1850.

Referring to the positive expenses which attach themselves to the conveyance of land, the Report says,—‘The purchaser has to guard against the suppression of deeds, he has (among other things) to assure himself that the vendor has concealed no settlement and suppressed no will, that he has not charged the estate which he offers as unencumbered, and that no power has been executed to defeat or lessen his apparent interest. The fact that such suppressions are rare (if, indeed, it be a fact that they are rare) does not relieve him from the necessity of inquiry. Hence an elaborate investigation into the title, inquiries into innumerable points, and searches in various places’ (in the words of the Royal Commission on which the Report followed) ‘manifold, intricate, chargeable, tedious, and uncertain. The expense of all this is very great and burdensome.’

After referring to other evils attendant on the existing system, the Commissioners say, ‘We are of opinion that these evils may be lessened by the establishment of a General Register.’

The Commissioners then state, with great truth, that ‘those expedients which may afford to purchasers or lenders protection against fraud will secure a great and direct benefit to landowners by the increased value of their possessions.’

These are sound views, and it is only to be regretted that hitherto England is without that great safeguard of heritable rights, a national register.

I may here add, that the same Report shows the want in England of any effective plan for making title-deeds which are common to more than one property available to all. The consequence is, as the Report says, that lands are sometimes made unmarketable. Our arrangements on that point (for we have exactly the same thing to provide for) are coeval with our Courts of Justice, and perfectly effective and satisfactory.

But practically, as I have already stated, security is largely dependent on simplicity, of which distinctness and facility of adaptation may be regarded as necessary elements or consequences.

In the constitution or transmission of land rights, according to the law of Scotland, a written title is indispensable.

The right to the lands is constituted or acquired by a charter when an original feudal estate is created, and by a disposition when such estate is transferred. The ownership is instructed in either case by an instrument of sasine.

The ordinary deed of constitution of a grant of land is brief and simple. It contains a description of the parties; specifies the cause of granting, and subject granted; the term of the new proprietor's entry to possession; the manner in which he is feudally to hold; and the obligations or duties he is to perform as the vassal; his right to the rents and title-deeds; his liability to pay the future public burdens, and the seller's to pay the past; the seller's warrandice or obligation to make good the loss of the new proprietor if the subject is taken from him; the consent to registration for preservation and execution; the warrant for delivery of sasine, and clause of attestation; all expressed with the utmost brevity and (with reference to their statutory meaning) perspicuity.

The object of the instrument of sasine is officially to instruct the delivery of sasine or possession to the vassal or purchaser; and the instrument being recorded, as already explained, the right of property is complete.

On the transfer of lands the proprietor grants a disposition which deals with a feudal estate already created; and the chief differences between it and the charter are in the clause stating the manner of the feudal holding, and that the disposition contains a warrant for the resignation or surrender of the lands into the hands of the superior, with a view to his making a new grant in favour of the purchaser, as his vassal, in place of the seller.

The holding in the charter is of and under the seller only. In the disposition it is, alternatively, from and in place of the seller, of and under his superior, or of and under the seller himself;—technically known as the '*a me vel de me*' holding; the object being to give the purchaser the option of being vassal of the seller, or of the seller's superior, which has a very important practical use.

The introduction of the alternative holding, which is imported into the purchaser's sasine or infestment following on the disposition, was a very happy piece of ingenuity in Conveyancing. It had its origin under our old law, by which a superior was not bound to receive or enter any new vassal, except the heir of the last vassal; and a purchaser, until he was entered with the superior, had no security against the seller. The alternative holding had the effect of giving the purchaser immediate security as against the seller, and the right of entry with his superior, as soon as that could be obtained; and the clause as still in use has similar objects in reference to our present system, though from a different cause.

The disposition, then, is substantially the same as the charter, except in the clause of feudal holding. The deed being granted in the above terms, the new proprietor obtains charter from the superior, and sasine, whereupon he is placed completely in the right of the seller; but I need not here go into any detail regarding these formal deeds.

In practice there are other deeds of various names made use of in the creation and transfer of feudal estates, some of which, from special circumstances, are more or less complicated in their forms. But the writs above detailed exhibit the principles of the system; and the whole are essentially free of mystery, and easy to be understood and made use of in practice.

The forms applicable to properties situated within Royal Burghs have some peculiarities of detail; the Crown only being superior, and subinfeudation being prohibited. But the same precision of form, the same rules as to registration of titles and deeds of security, and the same law of prescription, are in force in regard to burgage as to feudal property.

These properties are seldom largely held by any individual owner, otherwise the want of the power of subinfeudation would be a serious inconvenience.

Before leaving the forms of conveyances of land as established in Scotland, it may perhaps be interesting to read the terms of a similar conveyance framed in a district near Madras, and to observe that these are substantially of the same import as ours, divested on the one hand of feudal forms, and invested on the other with a decidedly Eastern costume. The deed is a bill of sale of land in the Tamul language, and I give you the translation by Forbes in his *Oriental Memoirs*, vol. ii. p. 55. It is as follows:—

‘Be it propitious,

‘On this fortunate day, Monday the 16th of the month Ahvany, of the year (of the Cycle) Kahlyuktee, in the year of Salinaham 1720, and of the Cali Yug 4899, being the third day of the crescent moon, under the auspicious conjunction and happy influence of the constellations Ashanatte and Magarum—Kistna Sawmey Pilla of Cunnatoor, the son of Vencatachelum Pilla, for himself and his house executes this deed of sale of land to Cumana Sawmey Pilla. That is to say, of the twenty-eight established shares of Cunnatoor, I have made a full and complete sale to you of my own two shares therein for one hundred chuckrums; and you having paid, and I having received, the said one hundred chuckrums for the said two shares; therefore possess the *Nunja Punja* (wet and dry lands), trees, groves, gardens, hillocks, water, wood, stone, and treasures, the well that points beneath, the tree that points above, together with all property belonging in common thereto within its four boundaries. Your children from generation to generation are free to bestow, or exchange, or to dispose of it at their pleasure. Possess and enjoy it as long as the sun and the moon, the earth, and its plants and flowers, the mountains, and the river Cauvery, exist. And all prosperity attend you. This is subscribed by me, Kistna Sawmey Pilla, with my full consent to Cumana Sawmey Pilla. This deed is written by Mootoo Sawmey. The village Conicopoly.’

(Signed)

KISTNA SAWMEY.

Witnesses—ARNACHELUM.
SUNKALINGUM.
SHUMMOGUM.

The deeds connected with the large department of heritable or real securities ought here to be shortly noticed. Formerly, these were constructed on the same strictly feudal principles as absolute land rights, but looking to their objects it was clearly unnecessary that they should have been so; and by recent Statutes they have been relieved of all feudal forms, and made much simpler and more effective. They have, in fact, been adapted to their peculiar purposes.

The deed of constitution of a security acknowledges a sum of money borrowed or due, and contains an obligation for payment at a particular time and place, with interest till paid, and penalty in case of failure in payment—a disposition of lands in security—power to the debtor to redeem his lands on payment of the debt—power to the creditor, if necessary, to enter to possession, and levy the rents of the subject of his security—power, after notice, to realize the subject of security by sale, with provisions for giving the purchaser an indefeasible title,—and these all in nearly as few words as I have used in enumerating them. This deed being recorded in the Register of Sasines for publication, the right and security of the creditor is complete in preference to all subsequent acts and deeds. The modes of transmission of securities to heirs or others are essentially simple; and the deeds of extinction are not less so, but with the terms of these I need not here trouble you. As a general rule, the deeds all enter the Register of Sasines for publication.

In regard to the important branch of leasehold rights, I shall only notice that, from the early period of 1449, tenants in possession held rights indefeasible at the instance of the granter, or his heirs, or of new proprietors. This quality of their rights is founded on express Statute, which marks not only the practical sagacity and policy, but the essential equity, of the views of the legislators of that early period. It would have been still better if the Act had protected tenants in the case of forfeiture of the landlord's right to his superior, but that omission does not occasion much anxiety in practice at the present day.

The next point in connexion with the Scottish system of land rights is the facility of its adaptation to circumstances.

Originating in times when superiors required military service, and vassals protection, the system has had incorporated with it such changes as from lapse of time, or other causes, have become necessary, and has adjusted itself, and is now adapted to the requirements of the day without the subversion of any principle.

In proof of the incorporation of needful changes, I point to the Acts of Parliament passed from time to time for introducing amendments and accommodating the system to the state of the times,—I mean the Act of 1469, giving creditors, appraisers, or judicial purchasers, the right of entry with the superiors of the lands appraised, an Act which was indirectly rendered available to voluntary purchasers; the subsequent Acts of 1672, 1681, and 1690, giving similar privileges to creditors holding decreets of adjudication, the most ordinary form of judicial disposition

now in use, and purchasers at judicial sales; the Act of 1747 extending these privileges to all parties holding voluntary dispositions with procuratories of resignation; and, above all, the Conveyancing Acts passed in 1845, 1847, and 1854.

The Acts of 1845 were of great practical value; one of them putting an end to the custom, which ought not so long to have co-existed with our records, of proceeding to the lands in order to give sasine thereof by delivery of earth and stone, or other accustomed symbols of infeftment. Those of 1847 were replete with amendments in every department; and that of 1854 carried out more extensively in detail the operation of those previously passed.

To understand the occasion for some of the provisions in the Acts of 1847, it is necessary to recollect that the Scottish representative system, as in force prior to the year 1832, favoured the creation of nominal estates of superiority holding of the Crown, but having no beneficial interest attached (except the right of voting in the election of members of Parliament). That privilege having been abrogated in 1832, the superiorities became in some cases of so little value that the proprietors would not incur the expense of making up titles to them. The vassals, however, could obtain titles only through their superiors, and, though the old law did afford a remedy, it was cumbrous and uncertain. Titles were thus to a certain extent running into confusion, and risk of injury was arising. In these circumstances, the Acts of 1847, framed by Lord Rutherford, who was at the same time a most profound lawyer, and one of the greatest masters in Conveyancing in modern times, gave both an easy method of dealing with the superior's title, reserving to the owner the full value of his interest, and in all cases the means of making a safe and practicable title, generally without recourse to the superior.

Numerous other amendments were engrafted on our system by these Acts, including the substitution of the English for the Latin language in Crown charters—a change which Cromwell had introduced 200 years before, but which was departed from on the Restoration of King Charles; and those who had experienced the deficiencies of the former state of things will appreciate with me the extent of the relief which was wrought by these amendments. For real improvements are welcome to no one more than the Conveyancer. Forms, if useless, are only a source of error; needless multiplicity of writings an increase of labour and waste of precious time.

And, with reference to the actual adaptation of the system to existing requirements, if we look to the absolute transfer of an estate, we find our forms perfectly suitable. The object there is to put the new proprietor in the room and place of the former owner, which is done by the disposition from the latter, which I have already explained, with the charter and sasine thereon.

But the power of adaptation is more strikingly exhibited when we turn to the very numerous class of transfers arising particularly in towns

or populous districts. In these cases the object of the seller is, not to part with his property, but to improve his income; of the buyer, to obtain the site for a dwelling-house, or other building; and it suits a large class of buyers to pay the price in an annual, in place of a principal, sum. They have to build and carry on business at the same time, and they want all their capital for these purposes. The transaction is arranged so as to meet the views of both parties,—by charter of the lands to be holden of the seller, as superior, for payment of the agreed-on yearly sum as feu-duty. I have already explained the general terms of the charter, and have shown that the purchaser can thereby obtain complete security of title; and the security of the seller, as the superior, for his reserved annual payment, is so perfect, that no omission or act of commission on the part of the purchaser can deprive him of it. In such cases, also, we often meet with a variety of reservations and conditions, many of them intended for the mutual benefit of buyer or seller, and the feudal system is peculiarly favourable to the constitution and protection of these. The title, moreover, of the seller, or superior, though embracing hundreds of similar rights, is capable of transference by a deed as simple as before a single feu-right was granted, or a single reservation or condition created. And the system is in full exercise at this moment. A great proportion of our largest towns is built on grounds acquired in the above manner, and it is essential to the development of many valuable properties that the consideration upon a sale shall in whole or in part consist of an annual payment.

The alternatives we have heretofore had within reach have been a conveyance subject to a rent charge, commonly known as a ground annual, and a leasehold right. But the inferiority of the former is well known, and is best illustrated in this, that, in practice, no parties contracting will secure an annual payment by rent charge when it is in their option to deal by feu-duty and feu-right.

And leases under our former law were still less resorted to in such circumstances. They were exposed, however, to great disadvantage in the non-existence of any provision for their being effectively transmitted, or charged with debt, as feudal estates were, by means of registered titles or deeds of security, and that great deficiency having been supplied by the Act 20 & 21 Vict. cap. 26, in the case of leases of small possessions, and for not less than thirty-one years' endurance, we shall now have an opportunity of seeing whether those who deal in such subjects have really a preference for the feudal title or not.

Hitherto, however, the power of subinfeudation—of constituting the relation of superior and vassal,—in other words, the distinguishing feature of the feudal system, is that which practically has made our land rights in the most numerous class of cases subservient to the wants of the general public.

I have now endeavoured to give a general view of the position and duties of the Conveyancer, and of the system with which he has to deal.

And I trust that, without putting the claims of this Professorship too high, I have shown the essential importance of its object in connexion with the business of life and the wants of society. But the great point I have had in view is to show that our system not only affords the invaluable advantage of complete security, but is also in a remarkable degree possessed of practical flexibility, admitting of easy adaptation to the ever-varying circumstances of our great national community.

Perhaps, before closing, I ought to remark that various proposals have been made, of late years, for amending, or I might rather say abrogating, the whole system of Scottish Conveyancing as founded on feudal principles. This is neither the place nor the occasion for the discussion of such subjects. If they shall ever be brought forward in a tangible form, the existing system will, I doubt not, call around it a goodly array of defenders. That time or circumstances will call for changes hereafter, as has been the case heretofore, is matter of certainty, and none will desire them more than the Conveyancers, for they, more than any others, feel the inconvenience of a defect. But let it be remembered that we have not to inaugurate a new order of things, nor have we ever found the existing system inadequate to the occasion. Whether, if we were beginning of new, the relations of superior and vassal, originating in a reality which is now only matter of history, and adapted by us to circumstances wholly different, would be introduced as a mere technicality, is not the question. The system, with these technical relations, has been handed down to us. It is well understood, and in full operation, and is essentially a national institution. And as, in former ages, it was adapted to troublous times, and was even nourished by wars and commotions, it is now no less adapted to the peaceful and prosperous state which we happily enjoy. In the reform of our system, we have always been advancing, and have never yet had to retrace our steps; and I can imagine nothing more disastrous and humiliating than to make any material change which, on trial, shall prove a failure. Let us therefore build upon the safe ground-work of the tried system, and incorporate ameliorations when they are called for, but beware of changes, however specious, if they do not receive the cordial and general approval of intelligent and practical men.

* * * * *

The institution of the Chair of Conveyancing in this University is directly traceable to the high sense of the importance of the systematic teaching of that science entertained by the enlightened Society of Writers to the Signet.

The study of Conveyancing has always necessarily occupied much of the time and attention of the members of the legal profession in Scotland; and its interest was very attractively brought under their notice, towards the close of last century, by Mr. Walter Ross, W.S., in his *Lectures on the History and Practice of the Law of Scotland, relative*

to *Conveyancing and Legal Diligence*,—a work of great ingenuity and research, and which, at the same time, shows the importance, especially to those about to enter on the legal profession, of prosecuting the study scientifically. He says,—‘It is a trite but just remark that the value and rank of every art and science is in proportion to the mental powers employed, or the mental pleasure created, by it.’

Again,—‘There was a time, it is said, when Conveyancers and formalists in Scotland possessed a degree of learning and information in which they acknowledged no superiors; when styles were considered as the foundation of the fabric of our law.’

And he thus explains what immediately led to the preparation of his lectures:—‘Having often, in the midst of practice, amused myself by tracing the origin, the principles, and the progress of particular parts of our forms, I insensibly contracted an inclination to the study, and felt a wish to prosecute it. I reflected that other professions were furnished with separate instructors in all their branches, which rendered the education of students scientifically complete; that the practice of the law was communicable by the same method as the theory of that science; that in the practice of law all the forms are at hand, ready to be exhibited, arranged, and combined at pleasure. Thus, by degrees, I was led to think that I could not employ my time with more advantage to my profession, or more pleasure to myself, than by dedicating it to the study of the practical part of the law of Scotland, and to the instruction of young gentlemen, destined either to the bar, the writing chamber, or other branches of the profession.’

Such is his account of the origin of those Lectures, which professional men never study without instruction, and which, I doubt not, gave a palpable impetus to the feeling, that a full and systematic course of lectures on Conveyancing was a professional *desideratum*.

That feeling, however, had been to some extent previously manifested. Mr Ross says, ‘Some gentlemen of distinguished abilities have at different periods determined to dedicate a portion of their time to lecturing upon the several branches of their business, which they wished to impart to the youth under their care.’ An able lecturer on Conveyancing, Mr. Galloway of Glasgow, states in his published lectures, that he was possessed of one of the original manuscript catechisms on Conveyancing used in Edinburgh about a century and a half ago. But, perhaps, all other evidence of the occasion felt for systematic teaching yields to that which was exhibited by one of the leading members of the Society of Writers to the Signet,—one of a family which has for several generations given leading men to that Society—sitting down to write an elaborate work on Conveyancing, simply for the instruction of his own son. This was done by Mr. John Russell, in his *Treatise on the Theory of Conveyancing*, which he gave to the public in 1781; a sound and excellent work, though now valuable chiefly in historical interest.

What has just been said is enough to show that the necessity for

systematic teaching was deeply felt; and it was seen to be inexpedient and unsafe to leave the future members of the profession to depend on the precarious teaching even of masters armed with catechisms. The Society of Writers to the Signet, wisely judging it to be essential that special provision should be made for the instruction of the members of their body in this department of law and practice, instituted a Lectureship on Conveyancing in the year 1793.¹

The objects of the Society in taking that step were most effectively carried out by my predecessors, whose great ability as teachers caused the value of this Chair to be widely appreciated.

Mr. Robert Bell, the first Lecturer, was well qualified to give his office a high reputation. A member of a family of distinguished men, he had proved his fitness for the appointment of Lecturer on Conveyancing by his reports of the Decisions of the Court of Session; the character of which is not surpassed by the best reports of modern times; and by his Lectures on the Attestation of Deeds, which exhibit great learning and research. But his appointment did not put a stop to his efforts as an author. He afterwards made valuable contributions to our legal literature in his Law Dictionary; his work on the Completion of the Title of a Purchaser of lands; and his Treatises on Leases, and on Deeds in general. These works, having been well planned, have been ably supplemented in various editions; and they are now daily resorted to, as well for instruction as for reference, by both branches of the legal profession.

Mr. Bell's successor as Lecturer, and the first Professor, was Mr. Macvey Napier, who came to hold a high office in our courts of law, and was also of great authority among men of science and letters, as was shown by the manner in which he fulfilled the duties of editor of the *Encyclopædia Britannica*, and by his being selected to fill the very responsible position of editor of a far-famed Literary and Critical Review,—and that in immediate succession to one who had given the Review a European reputation—I mean the late Francis Jeffrey. But it is with Mr. Napier's qualifications for this Chair that we have here chiefly to do,—and of these I can join a numerous body of his students in speaking with the highest respect and gratitude.

His successor, Professor Menzies, very early distinguished himself in this University as a man of high education, taking rank as one of the very foremost in a literary competition, which proved that classical

¹ It is not a little curious to know that the institution of a Chair of Conveyancing had been strongly urged upwards of a hundred years ago by certain individuals in the legal profession. The foundation of the Chair was then successfully resisted by the Society of Writers to the Signet, on the ground that it would interfere with the duties of masters in the teaching of their apprentices in chambers. About forty years afterwards the Society had become more enlightened on the subject, and, perhaps, the apprentices of a former generation, now become masters, had come to think that they would have been better instructed by lectures from the Chair, than by lectures from their masters. The Society accordingly endeavoured to have the Chair instituted in the University, but they were at that time successfully resisted by the Faculty of Advocates, on the ground that the Chair would interfere with that of Scots Law, and was not required.

attainments of the highest order were to be found among Scottish students. But it was as an educationist that he pre-eminently shone. Officially connected, whilst but a young man, with a great Institution for the benefit of teachers in the north of Scotland, he was mainly instrumental in promoting, by the means which that Institution placed at the disposal of its directors, the high object of raising the standard of qualification in the teachers; and he was able, and accustomed, himself to test both their qualifications and the results of their teaching.

His success as a teacher of Conveyancing is universally known, and none can study his published Lectures without seeing the explanation of his success; without seeing in him the philosophical and practical teacher; without admiring and enjoying the high tone which pervades his work; without a clear perception that he who was so early withdrawn from a field of varied usefulness threw into his daily teaching the spirit of that highest of all characters—a Christian gentleman.

But, in the more peculiarly professional training of his class, there was a marked feature of incalculable value, which his published Lectures do not exhibit. I mean the system of examination by written questions, given out in the class-room to be answered there, without the aid of book or note. That system was, I may say, introduced, as it was laboriously worked out, by Professor Menzies, and deserves to be spoken of in terms of unmixed approval. But it certainly makes no little addition to the labour and to the anxieties of the Chair; and all honour is due to Professor Menzies for having surmounted difficulties of a very serious nature, in establishing this system of examination, and for giving it such vitality as rendered it impossible for his successor to abandon the plan of the written examinations. They are a mainstay in promoting the general usefulness of the class.

I have now to request your attention to a few remarks on the manner and spirit in which you ought to enter on the rather laborious work of this class, and prepare yourselves to fulfil the onerous and responsible duties which usually devolve upon Conveyancers in this country.

The first professional requisite plainly is, an extensive and accurate knowledge of the Law of Scotland. The study of the Law of our own country, when rightly conducted, will always be found elevating. In order to obtain due acquaintance with it, we must carefully study the works of our institutional writers, particularly Stair's and Erskine's Institutes, the excellent Commentaries of Professor Bell, and the Reports of the Decisions of our Supreme Courts. As far as this requisite is concerned, most of you, I doubt not, have already laid a good foundation for a profitable session in this class; and I may here observe, principally for the benefit of those who have not been engaged in practical Conveyancing, and who, consequently, are not familiar with the meaning of those law-terms which are necessarily employed in these Lectures, that the Law Dictionary before referred to, as admirably remodelled by the

late Mr William Bell, and of which there is a recent edition, is likely to be found useful in the way of explanation.

In reading these works your constant aim must be to acquire familiarity with principles. You ought never to be satisfied until you have mastered the principle on which every position is founded—on which every decision proceeds. It must be your rule to search for principles, and especially, when cases bearing some resemblance to each other issue in different results, to sift and contrast the facts, until you have seen where the distinction of principle lies. And here I may remark, that the students of the present day have great advantages over those of a generation back, because of the full exposition of reasons given in the reports of decisions as now issued. We have, indeed, admirable reports in Mr. Robert Bell's collection, but these extend only over the years 1792 to 1795. We have for some time also had Baron Hume's collection, extending from 1781 to 1822. These are full of instruction; but they are only a selection. In a large class of the reports prior to 1825, we see only the facts of the case, and the judgment, without the reasons, which we are left to discover as we best may. In the more modern reports, however, the principles are fully stated and discussed. The reports, in fact, often contain elaborate and philosophical treatises on legal subjects, than which nothing can be more instructive to the student of law.

Side by side with strictly legal knowledge, the Conveyancer has to make himself familiar with the forms of deeds and instruments, and the particular uses of the several clauses or constituent parts of each. Mr. Ross, in his Lectures, points out the value of the study of forms to all who are destined to the profession of the law; and quotes both English and Scotch lawyers of the highest authority as inculcating in unqualified terms the study of the forms of writs. And he shows that the study must become attractive when rightly pursued. On this point, I may refer also to Lord Kames, who says of the theory—what is not less applicable to the practice—that, when properly treated, 'in place of a dry, intricate, and crabbed science, it becomes an entertaining study.' When it is not of the latter description, the fault, I apprehend, is in the person, and the spirit in which he proceeds—not in the subject.

In connexion with the same point, let me here request your attention to the following emphatic observations of Lord Cockburn, when giving his opinion in the case of *Leith*.¹ Speaking of certain words employed in a Last Will, and of their effect as operating the revocation of a prior deed, he says,—'It has been said that the revocation is merely 'expressed in general words of style. This, if correct, only makes the 'revocation the stronger. Words acquire the character of being words 'of style solely because—from their expressing a thought, necessary or 'usual for the occasion—they can never be safely omitted. "I hereby "dispone," is a piece of style, because without it there would be no dis-

¹ *Leith*, 6th June 1848, 10 D. 1159.

'position. When a man reserves power to revoke a deed, and says in 'a subsequent writing, "I revoke that deed," the force of these words is 'surely not weakened by saying that they are so precise, necessary, and 'conclusive that they have become words of style. No insignificant 'word ever becomes a matter of style.'

A Conveyancer, then, ought to have due acquaintance with the principles of Scots Law, and familiarity with forms, and the particular objects and uses of clauses and words.

Considering the multiplicity and variety of the transactions occurring in a community like ours, it ought, perhaps, to be matter of congratulation that cases arising through defective Conveyancing are not more frequent than they are; and, seeing that the imperfect work alone comes under notice, we have some ground to think that the practice of Conveyancing is, at present, in a sound state. But the reported decisions still exhibit too many cases in which questions of difficulty have arisen from ignorance of the law, or from negligence of form, or want of clearness in expression on the part of the Conveyancer. And how necessary, therefore, is the study I am now speaking of—how important it is to be familiar with apt styles and words. In going over the reports, we cannot fail to see that if such and such a clause had been more accurately expressed; or if certain technical terms had been inserted, or, it may be, left out, or differently placed; or if the same thing had always been expressed in the same words, (as it ought invariably to be); this or that difficulty would never have arisen. In connexion with this point, I may quote the words of Blackstone, who, in reference to the unhappy consequences of ill-expressed Wills, states with great force what I am now endeavouring to impress on you. In these cases, he says,—'Difficulties arise in discerning the true meaning of the testator, 'or sometimes in discovering any meaning at all; so that in the end 'his estate may often be vested quite contrary to his instructions, because, 'perhaps, he has omitted one or two formal words which are necessary to 'ascertain the sense with indisputable legal precision.' Our own reports speak of similar unfortunate results from similar causes. And I may here remark on the necessity of weighing accurately not only the precise force and value of each word of importance, when taken by itself, as being the first step towards perspicuity, but also of weighing with equal care the effect of such words when taken in collocation with others. This last rule requires to be observed as carefully as the first, in order to avoid ambiguity.

You ought, then, to cultivate accuracy and precision, and the former not only in statement, but also in arrangement, and never to forget that it is the business, and ought to be the pride, of a practical Conveyancer to construct deeds not merely so that, if tried, they shall stand the test, but so as to be beyond the reach of trial.

Another point on which it is necessary, especially for practitioners, to keep themselves on their guard, is the liability to be too much of

formalists. Mr. Ross says truly,—‘The Conveyancers’ employment is partly mechanical, and the more they deviate from the employment of the mind, the more they sink in esteem. Is it not a shame,’ he says, ‘to see people, during the whole course of their lives, writing words, nay, whole clauses of deeds, they do not understand, and going gravely on, like horses in a mill, the round of forms, without knowing one iota of their origin, their progress, or even their present importance? The only reason they have for doing anything is—that it has been done before. The least deviation from practice confounds and distracts them.’

To the same effect Blackstone says,—‘If practice be the whole the student is taught, practice must also be the whole he will ever know. If he be uninstructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract and bewilder him; “*ita lex scripta est*” is the utmost his knowledge will arrive at.’

All tendency to this state of mind is to be resisted. Our mental powers must be kept in exercise, and our judgment carried along with us habitually by patient earnest study. It is by becoming acquainted with principles, and acquiring the faculty of applying them, that the student-conveyancer takes the lead of the formalist. The student has learned his business scientifically; he knows the points to be examined, established, digested, arranged, and applied; and, passing from simple deeds or ordinary duties, he goes on to fitness for the complicated and intricate, and capacity to see where improvement is attainable, and how to effect it. He has laid the foundations well, and the building proceeds securely. The formalist, on the other hand (apart from accidental advantages), must stay where he is. He is a mere copyist, a condition which, when confirmed, conveys to my mind the idea of confession of inexcusable inferiority. It is told of a man who had risen to great eminence as a mechanical engineer and merchant, that being taunted, as if to his disparagement, with having been once a blacksmith, he sharply replied, ‘If you had ever been a blacksmith, you would have been a blacksmith still.’ So with the copyist, he will, as far as such an one can, injure the character of a liberal profession.

I am the more anxious to impress on you the necessity of acquiring the knowledge of principles, because we are apt to overlook the full import and value of words of common occurrence, and to forget that such words have an important meaning, and may not under all circumstances have the same meaning. We are apt to be satisfied with knowing their practical operation, as embodied in particular deeds, without troubling ourselves further about them; and, no doubt, the great point is to frame deeds which shall stand fast. But, as the demands of a great community advance and become more and more varied, we are much exposed to have arrangements of a novel character to express in deeds and instruments; and clauses to frame, for which styles are not to be found in a book. They can only be drawn up by one whose mind is

well stored, and trained and accustomed to think. We may likewise have, and indeed we actually have year by year, to consider proposed changes in our system of law or practice. And if we have learned merely by rote, we cannot be trusted, nor can we trust ourselves, to frame or adjust the requisite writings. It is the more necessary that we should apply ourselves to the study of clauses and words, and their legal meaning and import, now that, in consequence of the recent Conveyancing Acts, some clauses occurring in older deeds are practically abolished; and others of great importance, intimate acquaintance with which is essential, are transferred from deeds to the Statute-book—the deeds containing only a few relative words, which are more suggestive of inquiry than in themselves expressive. We are now more than ever, therefore, in danger on this critical point; and I desire the more forcibly to press upon your attention the value of the scientific acquaintance with all the materials we have to work on.

I believe I need hardly say that I cordially welcomed these Conveyancing Acts. They have greatly simplified forms, diminished expense, and removed the risk of error. Built upon our well-tried and venerable system of Land Rights, they have confirmed its principles, and have proved, even to those who doubted, how perfectly these are, and can be, adapted to our national wants. But whilst full of admiration of the Acts, and grateful to their distinguished authors for the benefits they have conferred on the Conveyancer, I wish at the same time to warn you of the collateral danger they seem to involve.

Thus far there is no difficulty as to what is necessary in preparation for the active duties of practical Conveyancing.

But Conveyancers, from their position in Scotland as the ordinary legal advisers of a large portion of the community, have to exercise an important influence in society. They are necessarily resorted to on those occasions when the individuals who consult them are most apt to propose, with all eagerness, and, perhaps, with perfect sincerity, what is an undue exercise of power, or, it may be, is positively wrong. Now, without arrogating to ourselves higher rules or principles of action than we allow to be in operation with the members of other classes in the community, I state my belief that a beneficial influence is exercised by those belonging to our profession to an extent which is little thought of, and, indeed, almost unknown. The decisions of courts of law expose cases in which there has been a failure in duty, but they seldom tell of those where the duty has been performed. The cases of this last description are almost unknown,—silence on the subject being itself an essential part of the Conveyancer's duty. But, considering the extent and diversity of the interests open to be affected by the influence I am speaking of, and the variety of character we necessarily meet with, the comparatively small number of cases open to animadversion demonstrates that the influence is made to operate, in the main, well and honourably.

Still there are cases where advisers have come short of their duty on this point, and their clients, or their clients' memories, have been exposed, where, probably, a little more courage, joined with discretion, in the adviser, might have been called into exercise with the highest benefit.

If those who thus seek advice are under the influence of short-sighted or morbid views, our duty to them bids us point out what we see to be the better course ; and if, through temptation or passion, they seek our aid to accomplish what is wrong, our duty to them directs us further to point out their error, and, if they will not desist, it is as clear a duty to our profession, and most of all to ourselves, to cease to be their advisers.

I urge, then, in addition to the diligent and patient study of principles and forms, the utmost care in the preparation of deeds, the choice of words, and arrangement of clauses ; moral courage when required in advising, and self-denial when called for in practice, and all these on the ground of simple duty. You have chosen a high and honourable, though a laborious, profession. A more elevated moral tone is not to be found in any class than in that with which you propose to connect yourselves. You are also about to engage in the study of Conveyancing at a time when our system is well understood ; and I entreat each of you to think that it lies with himself not only to maintain, but to advance, its estimation and position, and to preserve for Scotch Conveyancers that character for accuracy and learning and honour which they have so long enjoyed.

BRANCH I.

DEEDS IN GENERAL

TITLE I.—SOLEMNITIES IN THE EXECUTION OF DEEDS.

CHAPTER I.

WE are now to enter on the special business of the Class; and I am to explain the solemnities to be observed in the execution and authentication of Deeds in general (other than bills and promissory-notes),—that is, of the Writings by which obligations and rights are legally instructed, or proved, and perfected in Scotland.

One of the first great objects in every system of jurisprudence is to give security of title to property, and specially to afford protection to parties contracting with one another against fraud and error. It is also essential to the wellbeing of society that parties should not, by the want of solemnities in point of form, be readily entrapped into important transactions. Lord Stair says on this point,¹ the prime interest of men is 'to enjoy their rights not only in safety and security, but in confidence and quietness of mind, that they may clearly know what is their right, and may securely enjoy the same.'

GENERAL
OBJECTS OF
STATUTORY
SOLEMNITIES OF
EXECUTION OF
DEEDS.

The law interposes to prevent fraud, by attaching punishments, more or less severe, to the crimes of fabrication and deception in reference to the execution of deeds. And, as human nature is constituted, it is absolutely necessary that such sanctions should be established and enforced. But penal sanctions would be totally inadequate by themselves to the protection of the interests of the community. The fear of punishment, after having successfully broken the law, would not protect us from the breach of it. Special solemnities, applicable to the execution of deeds, are essential to aid in preventing the breach of the law. Hence has arisen that branch in our code which relates to the mode of executing and authenticating deeds, as to which Lord Stair says, 'For the security of the people, and anticipation of error and fraud, and that evident probation may be had, men do most profitably order deeds to be done in such a palpable and plain form as it may easily appear whether false or not.'

¹ Stair, i. l. 15.

ANCIENT MODES
OF AUTHENTI-
CATING TRANS-
ACTIONS AND
DEEDS.

We shall find that in Scotland great attention has been paid to this important subject; but before explaining the rules of law upon it, which are for the most part statutory, but partly customary, it may be interesting to advert very generally to some of the modes or forms anciently adopted in authenticating transactions, and deeds, as containing enduring evidence of transactions.

AMONG THE
JEWS.

You will find recorded in the book of Genesis¹ the solemn manner in which Abraham took evidence of his purchase from Ephron the Hittite of a field for a burying-place; the payment of the price and the transfer of the property being made in the presence of all them that went in at the gate of the city; and you may, perhaps, have observed that he specially records the acquisition as including not only the field, but the 'cave therein, and the trees that were in the field.'

I next notice the passage in Jeremiah,² in which, upon a Jewish purchase, the purchaser says, 'I subscribed the evidence, and sealed it, and took witnesses.' 'And I took the evidence of the purchase, both that which was sealed according to the law and custom, and also that which was open: and I gave the evidence of the purchase unto Baruch, in the sight of Hanameel' (that is the seller), 'and in the presence of the witnesses that subscribed the book of the purchase, before all the Jews that sat in the court of the prison,' etc.

We have here a public ceremony, with written evidence subscribed, sealed, and attested by subscribing witnesses superadded. The party who subscribed seems, however, to have been the purchaser, not the seller; the seller and witnesses standing by, and seeing the document given by the purchaser to a third party, who was to preserve it for the purchaser. The seal made use of was probably the signet ring, which we know to have been of the highest authority in early times amongst the Jews and other eastern nations.

AMONG THE
ROMANS.

Mr. Robert Bell, in his Lectures on the Attestation of Deeds, gives the particulars of the authentication of a variety of ancient Roman deeds, and, among others, that of the gift of a monument made by Statia Irene, A.D. 252, the date being set forth with reference to the Roman consuls then in office. The party subscribes thus: *Iisdem Consulibus, eodem die, Statia Irene, jus liberum habens, donationi monumenti supra scripti, sicut supra scriptum est, consensi, subscripsi et adsignavi.* 'This holograph docquet' (Mr. Bell says) 'is the subscription of the party.' We have here the great essential of consent by the party, stated in express terms at the same time that she signs and seals. Again, upon turning over the copies of ancient deeds given by Mabillon in his work *De Re Diplomatica*, published in 1681, and supplement in 1704, many curious varieties of the mode of authentication will be found. Some deeds of very early date bear simply the subscription of the party. Some bear to be subscribed and sealed with the ring,

¹ Gen. xxiii. 16 to the end.

² Jer. xxxii. 10-12.

and some contain an order so to seal, indicating a keeper of the seal. Not a few parties, ecclesiastics, sign with the addition '*peccator*,' or '*quamvis peccator et indignus*.' Some adhibit their signatures *in nomine Christi*; in almost all cases the sign of the cross is affixed, and sometimes by the witnesses as well as by the parties. In some instances there are witnesses who sign, certifying, as was in strict conformity with rule, that they had been specially called to witness; and, in one case, the testament of Ermenthruda, a noble lady, two of the witnesses, besides expressing that they were specially called, add that they sign in the lady's presence, and a third says, *scripsi, relegi, et subscripsi*,—a very early instance of a deed containing the name of the writer, now one of the Scotch statutory formalities.

To come nearer home, Blackstone¹ mentions that 'the method of the SAXONS. ' Saxons was, for such as could write, to subscribe their names, and, ' whether they could write or not, to affix the sign of the cross,—which ' custom our illiterate vulgar do for the most part to this day keep up, ' by signing a cross for their mark, when unable to write their names; ' and indeed this inability to write, and therefore making a cross in its ' stead, is honestly avowed by Cædwalla, a Saxon king, at the end of one ' of his charters; which the Emperor Justin in the East, and Theodoric ' king of the Goths in Italy, had before authorized by their example, on ' account of their inability to write. In like manner, and for the same ' insurmountable reason, the Normans, at their first settlement in France, NORMANS. ' used the practice of sealing only, without writing their names,—which ' custom continued when learning made its way among them, though ' the reason for doing it had ceased; and hence the Charter of Edward ' the Confessor to Westminster Abbey—himself being brought up in ' Normandy—was witnessed only by his seal, and is generally thought ' to be the oldest sealed charter of any authenticity in England. At the ' Conquest, the Norman lords brought over into this kingdom their own ' fashions, and introduced waxen seals only, instead of the English ' method of writing their names, and signing with the sign of the cross. ' This neglect of signing, and resting only upon the authenticity of seals, ENGLISH. ' remained very long among us; for it was held, in all our books, that ' sealing alone was sufficient to authenticate a deed, and so the common ' form of attesting deeds as ' sealed and delivered ' continues to this day, ' notwithstanding the Statute 29 Charles II. cap. 3, passed in 1676 (and ' known as the Statute of Frauds), revives the Saxon custom, and ex- ' pressly directs the signing in all grants of land, and many other species ' of deed.' Blackstone adds, that 'the more modern opinion perhaps is, ' that the Statute of Frauds is applicable only to mere agreements, and ' that signing is not essential to the validity of a deed;' and this agrees with the definition of a deed given in the Supplement to Jarman and Bythewood's Conveyancing, (1850,) where it is said 'sealing and delivery are necessary to make a deed—signing is not.' But in a note to Stewart's

¹ Blackstone's Commentaries, vol. ii. p. 401.

edition of Blackstone (1854) it is said 'that the ceremony of sealing a deed is now of little importance.' To us, so long accustomed to think sealing a very inferior mode of authenticating deeds by private parties, it seems remarkable that, in England, signing should until recently have been thought of secondary importance in any case.

As regards witnesses, (I am still referring to English forms,) the *Magna Charta*¹ of King Henry III., and his Charter of the Forest, of the same date, 11th February 1225, bear to be witnessed by many persons of note, who do not sign. The Statutes of Edward I., 12th October 1299, confirming these Charters, are granted '*Teste Edwardo, filio nostro.*' The *Statutum Hiberniæ*, 9th February 1229, is attested thus: 'I myself, witness;' and the '*teste meipsd*' continues to be the form in most Crown writs at the present day.

In private deeds, the ancient custom was to specify in the deed the persons who attended as witnesses, and who, in former times, did not sign their names, (that not always being in their power,) but only heard the deed read. But in the reign of Henry VIII., learning being revived, and the faculty of writing more general, the witnesses usually subscribed their attestations, either at the foot, or on the back, of the deed. This continues to be the rule, but it does not appear to be the result of any Statute,—except as regards Wills, which, by the Act commonly known as Campbell's Act,² are not valid unless signed at the foot by the testator, or by some other person in his presence, and by his direction; and unless the signature shall be made or acknowledged by the testator, in the presence of two or more witnesses at the same time, which witnesses shall attest, and shall subscribe, the Will in the presence of the testator.

ANCIENT SCOT- TISH FORMS.

Anciently in Scotland, according to the Antiquarian Ruddiman, the practice of the Saxons and Normans was followed, in evidence of which he refers to the Charter by King Duncan II., forming the first of the Charters, of which facsimiles are given in Anderson's *Diplomata Scotiæ*. This Charter, the genuineness of which, however, appears to be questioned, is authenticated by the cross of the King, and crosses made by his brother, who was a consenting party, and by the witnesses present. It is not sealed, but by and bye, in the reign of the same Duncan, waxen seals came into use in authentications. In some ancient Scotch Charters the witnesses who happened to be present, whether men or women, were named in the clause of attestation. A Charter by David Earl of Huntingdon is tested in this manner—'*Testimonio Mathildis Reginae, et Wilhelmi filii sui.*'

CROWN CHARTERS.

This method, Mr. Walter Ross tells us in his Lectures, was continued in Crown Charters down to the reign of Malcolm IV., in which a Charter to Walter, Steward of Scotland, was so attested. Another

¹ King John's *Magna Charta* was granted on 19th June 1215, and it has the Great Seal attached. No one witnesses it as Chancellor, and Lord Campbell supposes

that for the time the Great Seal was in the King's own keeping, and was attached to the charter by himself.

² 7 Will. IV. & 1 Vict. c. 26, s. 9.

Charter of the same Prince, forming No. 25 of Anderson's Collection, has about fifty witnesses, men and women of the first note. This style came soon afterwards to be altered to '*In cujus rei testimonium sigillum nostrum apponi precepimus, testibus,*' etc., which continues in Charters from the Crown to the present day; and the witnesses named, who in such cases have never been in use to sign, have for a long period been the persons holding certain high offices. These are at present the Lord Clerk Register, the Lord Justice-Clerk, and the Director of the Royal Chancery.

Private Deeds were anciently executed and attested in Scotland in the same manner as Crown Charters. The great test came to be the affixing of the grantor's seal, which, in some instances at least, appears to have made the party responsible, though done without his actual consent. On this subject the *Regiam Majestatem* says,¹ 'Because the debtor may grant and acknowledge the seale, and deny that writ to have been made with his consent.

4. 'Gif he confessis in the Court the seale to be his seale, he shall warrant that writ, and shall be compelled to keep and fulfil the tenor thereof.

5. 'And shall impute to his own evil keeping of the seale, gif he incurres any damage or skaith, through the negligent keeping thereof.'

Sometimes, again, as we are told by Craig,² parties in authenticating their own deeds used seals lent them by others,—'*tanta erat iis temporibus, inter contrahentes, simplicitas;*' but, when such lent seal was used, it was proper to state the fact in the Charter, mentioning the name of the owner of the seal. The object of this was both to certify the liability of the real grantor, notwithstanding the seal used was not his, and to obviate all claim of liability against the owner of the lent seal. But, even when the grantor had a seal which was appended to his Charter, there are instances in which, if his seal was not well known, he appended also some other seal, the authenticity of which was undoubted. Thus I find an instance of this in a writing dated 5th November 1448, to which the seal of the grantor is appended, and the clause of attestation bears that, in regard the same is little known, the seal of a certain nobleman was also appended.

But the use of seals, excepting public or official seals, which were usually in special custody, and altogether distinctive in their character, was clearly open to much objection as a mode of authentication, both as regards grantors and grantees. It was probably, among other reasons, in order to diminish the risk arising from the liability of private seals to be fabricated, that the Act 1429, cap. 130, was passed, ordaining that 'upon the serving of inqueistes and Retoures againe to the Kingis Chappel' (that is, the Chancery), 'all Free-holders, dwelland within ony Schirreffedomes, compeir at the head Courtes, in their proper persones, with their

¹ *Regiam Majestatem*, Book iii. cap. 8, No. 3.

² Craig, *De feudis*, Book ii. Dieg. 4, s. 15.

PRIVATE
DEEDS.

OBJECTIONS TO
RELIANCE ON
SEALS IN CASE
OF PRIVATE
DEEDS.

'seales: Bot gif it happen theme to be absent upon a reasonable cause, and gif onie be absent, in that case, that he sende for him a sufficient Gentle-man, his Attourney, with the seale of his Armes.' But it is too manifest that, even with the most punctual observance of the above Act, the law as to the authentication of deeds must have been in a most unsatisfactory condition, as seals might easily be fabricated, or used without authority. And this brings us to the commencement of the system of authentication adopted, and now in use, in Scotland.

LEADING OB-
JECTS IN A STA-
TUTORY SYSTEM
OF SOLEMNITIES.

The point to be aimed at, in such a system, is that which unites all the evidence and all the formalities contributing to make genuine deeds worthy of trust, and their execution, without being overburdened with forms, a matter of solemnity,—that point which gives adequate opportunity of consideration to the parties before they commit themselves, and which affords the best means of preventing and detecting fraud.

So long as the art of writing was confined to the clergy, or little practised by others, the means of authentication of deeds were not very ample. Parties were in the hands of the 'churchmen-notaries,' who generally were skilled penmen; and several old Statutes, by their repeated reference to the '*falsets* of notaries,' give too plain evidence that the interests of the community were not safe in their hands. Recourse to a Judge, and the execution of a deed in his presence, and under his protection, might, perhaps, even at that period of our history, have afforded reasonable security, but such a mode of execution would have been cumbrous and expensive, and to many parties it must have been inaccessible. The revival of the art of writing, therefore, and the extensive teaching of that art amongst the community in Scotland, naturally formed the foundation on which to establish the mode of authenticating deeds; for it must be a standing subject of wonder that the handwriting of parties, all taught in the same way, all using the same instrument, all forming the same letters, should, notwithstanding, contain invariably so much that is distinctive, that, when we are driven to the *comparatio literarum*, we can so often make ourselves fully assured whether the signature subjected to the test is genuine and true, or is a fabrication.

SUBSCRIPTION
MADE ESSEN-
TIAL.

The Scottish Parliament accordingly introduced subscription as a necessary solemnity in authenticating a deed. This was done by the Act 1540, cap. 117, which bears for its title, 'That na faith be given to evidentes sealed, without subscription of the principal or Notar.' This Act—on the preamble that 'mennis seales may, of adventure, be tint, quhairthrow great hurt may be genered to them that awe the samin; and that mennis seals may be feinzieid, or put to writinges after their decease, in hurte and prejudice of our Soverain Lord's lieges'—enacts, that 'therefore na faith be given, in time cumming, to ony obligation, band, or uther writing, under ane seale, without the subscription of him that awe the samin, and wisse:

'or else, gif the partie cannot write, with the subscription of ane Notar thereto.'

This Act is the foundation of the system at present in force in Scotland. I read it as requiring the subscription of the party, *or* of a notary for him if he could not write, *and* of two or more witnesses. If that be the correct view, for which there is not wanting good authority, it will be remarkable that, so early as 1540, the mode of authentication by subscription, when the party could write, was placed by Statute at once on the footing on which it has stood ever since. It has, however, been questioned whether the Act required the subscription of the witnesses as well as of the party; and specially, whether witnesses were required in the case of subscription by a notary. Professor Menzies is of opinion that the Act did not require the subscription of the witnesses; and the practice which followed upon it was unquestionably various and unsatisfactory. Sometimes persons subscribed as witnesses who were not mentioned in the deed as such, but more generally the witnesses were specified in the deed, and their subscriptions dispensed with.¹

WAS SUBSCRIPTION OF THE WITNESSES REQUIRED BY 1540, c. 117?

Practically, the question of the meaning of the Act on the above point is not of much consequence now. I do not, however, reckon the irregularity of practice which followed as supporting either the one view of construction or the other; because, in reference to almost all the earlier enactments affecting the authentication of deeds, there has been an unwillingness to give instant and immediate observance to new statutory provisions, and, at the early period in question, it may not have been always easy to procure witnesses who could write. The argument, however, in favour of the view that witnesses were not intended to subscribe, is supported by the terms of the Act 1555, cap. 29, 'anent the sealing and subscription of reversions and writs belangand thereto,' which prescribes the sealing and subscription of the parties,—those who cannot write being to subscribe with their hand led at the pen by a notary. This Act says not a word of witnesses, and it is hardly to be supposed that if, in 1540, as regards deeds in general, the subscription of witnesses, as well as of the party, had been required, the subscription of the party alone would have been held sufficient as regards reversions and relative writs in 1555, being only fifteen years afterwards.

The Act of 1540, at all events, was not express in requiring witnesses, in the case of a deed signed by a notary, on behalf of a party who could not write; in that case, moreover, it required the subscription of only one notary. The interests of parties were thus placed too much in the power of the notaries of the day; and, apparently to remedy that evil, the Act 1579, cap. 80, was passed, entitled, 'Anent the subscription and inserting of Witnesses in Obligationes, and utheris writtes of importance.' This Act ordains 'that all contractes, obligationes, reversiones, assignationes, and discharges of reversiones or eikes thereto, and generallie all writs importing heritabil titil, or utheris bandes and obli-

SUBSCRIPTION OF WITNESSES REQUIRED BY 1579, c. 80.

¹ Erskine, iii. 2. 7.

'gationes of great importance, to be maid in time cumming, sall be subscribed and seilled be the principal parties, gif they can subscribe, uthewise be twa famous Notars' (that is, notaries of good fame or character), 'befoir four famous witnesses, denominat by their special dwellingplaces, or sum other evident tokens, that the witnesses may be knawen, being present at that time, uthewise the saidis writs to 'mak na faith,' or, as we should now say, to be improbative. This Act, you will observe, is specially applicable, *inter alia*, to reversions and writs of that description.

SEALING ALSO
MADE A
STATUTORY
SOLEMNITY.

These three Acts, 1540, 1555, and 1579, though intended chiefly to make subscription by, or on behalf of, the party and witnesses essential, all made sealing, the mode of authentication previously in use, a solemnity; thus giving statutory force to what had formerly depended on custom only, and affording an instructive evidence of caution in dispensing with any of the sanctioned safeguards in connexion with the authentication of deeds. But by an explanatory Act, 1584, cap. 4, sealing was dispensed with in reference to such writs, contracts, or obligations as were subscribed by the parties, and agreed upon to be registered in the Books of His Majesty's Council or other ordinary Judges, seeing the parties consent to registrate the same, which is a 'greater solemn act' than the sealing thereof. The nature of the 'solemn act' here referred to will be explained in connexion with the subject of the registration of deeds for execution or preservation. It is enough to observe here, that the agreement or consent, referred to in this Act, authorized a procurator for the grantor of the deed to produce it in Court, and consent to the Judge pronouncing decree against him in favour of the grantee for implementation of its contents. The clause of registration, therefore, was an authority for the judicial acknowledgment of the deed as the grantor's act; than which nothing in the way of authentication could be more solemn.

1584, c. 4, DIS-
PENSES WITH
SEALING IN
CERTAIN CASES.

We learn from Erskine¹ that sealing, though only partially dispensed with by this Act of 1584, fell quite into disuse soon after the passing of the Act; and as to private deeds, it is now (though without any express enactment on the subject) wholly unnecessary.

SEALING IN
DISUSE.

Considerable variety of opinion has prevailed regarding the intention of the Act of 1579, as to requiring the subscription of parties who could write to be before four witnesses,—as in the case of two notaries for parties who could not write; but whatever may have been the intention on that point, the Act certainly does not enjoin the subscription of the witnesses. And there can be no doubt that the practice which followed after 1579 was uncertain. Erskine² tells us, 'witnesses were, by the common practice, specially designed in deeds, and where they were not so designed, or not so much as named, the omission was accounted a sufficient objection to the validity of the deed; but, because the words of the Act were not clear with respect to that nullity, the grantee was allowed to give in a condescendence, pointing out who the witnesses

IRREGULAR OB-
SERVANCE OF
STATUTES ON
SOME POINTS
UNTIL 1681, c. 5.

¹ Erskine, iii. 2. 7.

² Erskine, iii. 2. 11.

'were, which condescendence was to be supported by the testimony of the witnesses themselves, if they were still alive; or, if they were dead; and had subscribed as witnesses, by comparing their handwriting in other deeds with their subscription as appearing in the deed under 'challenge.' On this point, Erskine refers to the case of *Colvill*,¹ where a variety of adminicles were admitted for proving the grantor's subscription; and to various other cases.

The practice of admitting a condescendence continued till the passing of the Act 1681, cap. 5, the authorship of which is generally ascribed to Lord Stair, and which is the most important of the Statutes now in force, in regard to the mode of authenticating deeds.

In the meantime, a new solemnity was introduced by the Act 1593, cap. 179, which recites that 'falsettes increasis daily within this Realme; And specially, be the writing of the bodies of the contractes, chartouris, obligationes, reversiones, assignationes, and all utheris writtes and evidentes, be the hand-writtes of sik persones, as ar not commonly knawen, and ar not commoun notares, nor bruiques na commoun office, and gif the writer were knawin the samine wald give great light to the tryall of the truth of the falsett of the said writ and evident;' therefore it is declared that all original charters, contracts, and other writs, to be made thereafter, shall make special mention, in the end thereof, before the inserting of the witnesses therein, of the name, surname, and particular remaining place, diocese, and other denomination of the writer of the body of the writ, otherwise the same to make no faith, etc. Here we have introduced, as a statutory requisite, a safeguard which was not unknown elsewhere or even amongst ourselves in more ancient times. I have already referred to the case of the Will of Ermenthruda, given by Mabillon, in which one of the witnesses names himself as the writer. The Charter by King Duncan of Scotland, given by Anderson, is another instance, as it has affixed to it the cross of *Scriptoris Grentonis*; and in the Indian Deed of Sale already noticed, the name and designation of the writer are particularly mentioned.

The provision for naming and designing the writer of the deed, thus introduced in Scotland, was calculated at the time, and is still held by many Conveyancers, to be a valuable preventive of the fabrication of deeds. The view that it is so is perhaps strengthened by some very remarkable cases which have recently occurred in England, in connexion with the alleged forgery of a Will professing to convey large estates in that country. It appears, however, that the Act of 1593 was not enforced, any more than the other Acts above detailed, with that strictness which, in regard to simple solemnities of form, is so essential to the due and proper working of a system of deeds. For although the Act of 1593 was so express in regard to the insertion of the name, surname, and designation of the writer of the body of the writ, and that under pain of nullity, the Court allowed condescendences to be received in reference to deeds

NEW SOLEM-
NITY INTRO-
DUCED BY 1593,
C. 179.

¹ Colville, 15th July, 1664, M. 16,882.

defective in these particulars, to the effect of supplying, by extrinsic evidence, what the deed itself ought to have set forth ; and with the result of having deeds sustained, which, by express enactment, were to make no faith.

This want of regularity continued for nearly a century. The Legislature had, perhaps, at first been in advance of the education of the people ; but the case came to be altered ; and, the further interference of Parliament having become necessary for enforcing what was useful in the older Statutes, and developing their principles and spirit, the Act 1681, cap. 5, before referred to, was passed, by which, on the narrative 'that by the Custom introduced when writting was not so ordinary, Witnesses insert in Writs, although not subscribing, are probative Witnesses, and by their forgetfulness may easily disown their being Witnesses ; for remedy whereof' it is enacted, 'that only subscribing Witnesses, in writs to be subscribed by any partie hereafter, shall be probative, and not the witnesses insert not subscribing ; and that all such writs to be subscribed hereafter, wherein the Writer and Witnesses are not designed, shall be null, and are not suppliable by condescending upon the Writer, or the designation of the Writer and Witnesses.' There then follows a most important further enactment, 'that no witness shall subscribe as Witness to any partie's subscription, unless he then know that partie, and saw him subscribe, or saw, or heard him give warrant to a Nottar or Nottars to subscribe for him ; and, in evidence thereof, touch the Nottar's pen ; or that the partie did, at the time of the Witnesses subscribing, acknowledge his subscription ; otherwise, the said Witnesses shall be reputed and punished as accessorie to forgerie.'

WHOLE SUBJECT OF AUTHENTICATION DEALT WITH IN 1681, C. 5.

AUTHORITY TO WRITE DEEDS BOOKWISE, BY 1696, C. 15.

The next Act passed in connexion with the present subject is that of 1696, cap. 15. Up to this time a deed was written on the face or broadside of one sheet of paper or parchment, or of two or more sheets of paper battered together. In either case, a deed written on paper was usually folded or rolled up. All such deeds were subscribed by the parties at the end, and when consisting of two or more sheets they were also sidescribed at the joinings of the sheets, as marginal additions now are. The same practice was observed in reference to the records of Courts, whence we still speak of the 'Rolls of Court,' 'the Master of the Rolls,' and the *Custos Rotulorum*, that is, the Keeper of the County Records in England. For removing the great trouble and inconvenience thereby arising in finding out clauses and passages in long contracts, decreets, etc., consisting of many sheets, it was by this Act ordained that it should be free thereafter for any person who had any contract, decreet, etc., to write, to choose whether he would have the same written in sheets battered together as formerly, or, by way of book, in leaves of paper, either in folio or quarto ; 'Providing that, if they be written bookways, every page be marked by the number *first*, *second*, etc., and signed as the margins were before : and that the end of the last page make mention how many pages are therein contained, in which page only witnesses are to sign,

' in writs and securities where witnesses are required by law : and which ' writs and securities, being written bookways, marked and signed as said ' is,' are declared ' to be as valid and formal as if they were written on ' several sheets battered together, and signed on the margin, according to ' the present custom.' A similar option had been allowed, in reference to Crown charters, by the Act 1672, cap. 7 ; and, though these Acts were only permissive, the form which they authorized was very speedily followed universally.

We have had occasion to remark on the irregularity exhibited in the observance of new solemnities introduced by Statutes ; and the Act of 1696 formed no exception ; nor can Conveyancers of modern times claim to have been more careful than their predecessors in this particular instance. The Act, in the most distinct and express manner, orders the marking of ' page first,' as well as of the succeeding pages ; but, by an almost universal consent, the first page of deeds was left unmarked. This *communis error* exposed deeds, in general, to the risk of exception ; and, to prevent the great confusion which would have arisen from the literal enforcement of the law, the Act 19 and 20 Vict. cap. 89 was passed, declaring it not competent to challenge any deed or writing on the ground that the pages thereof are not marked by numbers, and no longer necessary to mark the pages of any deed or writing by numbers ; which enactment, however, is not to affect the provision of the Act of 1696, already noticed (being the Act which introduced the marking of the pages), or of any other Act of Parliament, as to mentioning the number of the pages of which the deed consists, or the provision as to subscribing each page of the deed, or any other provision of the Act of 1696. The marking of the pages of deeds by their numbers is therefore no longer a necessary solemnity ; and, though such marking continues for convenience, the abolition of the penalty attached to its omission has, I am sure, the approval of the whole legal profession in Scotland.

MARKING OF
PAGES DIS-
PENSED WITH BY
19 & 20 VICT.
c. 89. 1856

CHAPTER II.

I HAVE now detailed the enactments applicable to the execution of ordinary deeds by private parties.

We shall, by and bye, in connexion with this or other branches of the Course, have to consider the solemnities in reference to the authentication of Instruments of Sasine, Messengers' Executions, Decrets of Court, Office Copies or Extracts of Deeds, and some other Writings; and I shall have to call your attention to the Acts of 1860-61, as to the authentication of Wills, or other Writings relating to personal estate.

Meantime, I will go on with the further consideration of the general subject of subscription by, or on behalf of, the parties, in the order of the following particulars; viz,—

1. The subscription of the party when he can write.
2. The subscription of a notary or notaries for the party when he cannot write.
3. Subscription by, or on behalf of, blind persons.
4. Subscription of parties by initials.
5. Signing by mark only.

SUBSCRIPTION OF PARTIES WHO CAN WRITE.

1. First then, of the subscription of parties who can write.

Deeds by such parties, when written bookwise,—the mode now almost universal,—must be subscribed by the parties at the end, and also, when consisting of more sheets than one, at the foot of each page. The Acts to the above effect are 1540, cap. 117; 1579, cap. 80; 1681, cap. 5; and 1696, cap. 15. It is usual, and therefore proper, to sign at the foot of each page, in every case where there are two or more pages; but deeds written on no more than one sheet—that is, one single piece of paper, though folded so as to exhibit four pages—do not fall within the provisions of the Act of 1696, as not consisting of two or more sheets, or separate pieces of paper. Such deeds, therefore, may be written bookwise, and will be validly authenticated although the subscription of the party is adhibited on the last page only.¹ On appeal to the House of Lords, the objection to the deed in Smith's case, that the last page

¹ Williamson, 21st Dec. 1742, M. 16,955; Smith, 4th July 1816, F. C.

only was duly signed, was abandoned at the bar; but Lord Gifford stated his concurrence in the views of the Court of Session.¹ The case is instructive to practitioners. Irregularities in reference to the execution of a bond of caution to a bank gave rise to an action of reduction of the bond, founded, *inter alia*, upon the Act of 1696. The Court of Session having sustained the bond, the ease was appealed to the House of Lords, and remitted for reconsideration, with express reference to the operation of the above Act; and, although the bond was still sustained,—the Judges holding it as a fixed point that the Act related only to deeds consisting of more sheets than one,—the trial of the question forcibly exhibits the dangers resulting from carelessness of practice, and shows how serious may be the consequences, even when the result is not fatal to the deed.

A more difficult question connected with this point arose in the case of Bushby.² A question was here raised, whether a contract of marriage, drawn in the Scotch form, but executed in England, and, though consisting of three sheets, subscribed on the last page only, was probative; and whether the objection was removed by marriage having taken place on the faith of the deed. These points were not decided; but all risk of question should have been excluded, if possible, by recurring to the parties, and getting the deed regularly and formally executed before the marriage; or, if there was no opportunity to do so, by getting a supplementary deed executed immediately afterwards. In Bushby's case this was not timeously done; and, the husband having become bankrupt, the security for the provisions to his wife and children, on the faith of which the marriage had taken place, was exposed to trial at the instance of the trustee in his sequestration.

The subscription should be below the whole of the deed. In one case³ a deed was sustained where part of the testing clause was written below the subscriptions; but this decision was pronounced by the narrowest majority, and its authority is greatly doubted. A deed contained in one sheet, and which was subscribed only on the first page, was found ineffectual.⁴

If the deed is written, according to the ancient form, in a roll, it SIDESCRIBING. must be subscribed by the party at the end, as in the case of deeds written bookwise; and, when the roll consists of two or more sheets battered together, sidescribed on the margin at each joining. These solemnities are founded partly on custom, partly on the Acts applicable to the case of deeds written bookwise. Sidescribing is not, indeed, the subject of direct, express, enactment; but, in the case of Thomson,⁵ Lord Deas held the Act of 1696 as a statutory confirmation of the custom previously in operation; and in the case of Macdonald,⁶ a deed, con-

¹ Smith, 4th June 1824, 2 Sh. App. 265.

² Bushby, 23d June 1825, 4 Sh. 110.

³ Dury, 11th March 1753, M. 16,936.

⁴ Dempster, 15th Nov. 1799, M. 16,947.

⁵ Thomson, 1st Feb. 1856, 18 D. 470, affirmed 24th March 1859. 31 *Jurist*, 425.

⁶ Macdonald, 18th Dec. 1714, M. 16,808.

sisting of two sheets, and not sidescribed at the joining, was found null. Here the Court held the Act of 1696 as establishing the custom of sidescribing at the joinings.

MODE OF SUB-
SCRIPTION.
ANCIENT MODE
IN SCOTLAND.

REGULATED BY
ACT 1672, c. 21.

With regard to the mode of subscription, it was anciently not unusual for persons possessing land estates in Scotland, though not Peers, to subscribe the name or title of their lands, in place of their Christian name and surname. Mr. Ross¹ gives some curious information as to the early practice on this point, adding, 'that some signed by their 'surname, without the Christian name; and many by the name of their 'lands, altering the title with their property.' But by the Act 1672, cap. 21, passed with reference to the Office of the Lyon King at Arms, it is declared, 'that it is only allowed for Noblemen and Bishops to 'subscribe by their Titles; and that all others shall subscribe their 'Christened Names, or the initial letter thereof, with their Surnames; 'and may, if they please, adject the designations of their lands, pre- 'fixing the word "of" to the said designations.' This Act contains the rule now in force on this subject. In one case² a deed subscribed by a commoner thus, 'Fullerton of that Ilk,' without his Christian name, was sustained; but this solitary decision, to which our practice is wholly opposed, is not to be regarded as of authority, at least with reference to any modern deed.

I may here notice, as the mode of subscription in this country, that the Sovereign usually subscribes, the other members of the Royal Family subscribe their Christian names only, the Sovereign adding to her or his superscription the letter *R* for *Regina* or *Rex*. Peers subscribe by their title of honour alone—a privilege extended by custom to the eldest sons of Peers enjoying titles by courtesy merely. Bishops, by which we are to understand only those of the English Episcopal Church, drop their proper surname, and subscribe in place of it the name of their diocese. Peeresses in their own right, or whose title arises from marriage, including the wives of Peers by courtesy, subscribe their Christian name, in the same way as if they were commoners, and also their own or their husband's title of honour, as the case may be.

The Act requires all other parties to adhibit their Christian names in full, or the initial letters thereof; but custom allows an abbreviated form of the Christian name at discretion; and, except in the case of notaries-public acting officially, who, when so acting, are required to adhere to the subscription adopted by them on admission to their office, parties may either adhere consistently to one form of subscription on all occasions, or adopt sometimes one, sometimes another. Uniformity of practice, however, in this particular, is much to be desired. The surname must always be written in full. Heirs of entail in possession are usually required, by the deed of entail of their estates, to bear a particular surname; but it is not necessary for them, and when they are peers it is not usual, to adopt such surname as part of their subscription. Married

¹ Ross's Lectures, i. 127.

² Gordon, 21st June 1765, M. 16,818.

women sometimes, in place of subscribing their husband's surname, retain and subscribe their maiden name; and occasionally the widows of peers or baronets, after a second marriage to a person of lesser rank, continue the subscription used by them during the subsistence of their first marriage. In point of law these deviations from the general rules do not appear liable to objection. See, as to the former point, the case of Dunlop.¹

The subscription must be adhibited by the hand of the party, and without assistance; otherwise it is not his subscription, and the deed will be null. There are numerous cases in which deeds have been reduced because assistance was given to the party at subscribing.² In some of these cases the deeds were reduced because the parties' hands had been led; and in Ballingall's case it was observed on the Bench that it would be dangerous, and was unfit, to allow such a practice, where the law supplied parties with a regular and easy expedient for attaining their object. What that expedient is we shall have occasion to consider presently.

SUBSCRIPTION
MUST BE WITH-
OUT ASSISTANCE.

There must be no assistance as to any portion of the subscription. The entire subscription must be written by the party. A testament was reduced because the last syllable of the granter's surname (Moncrieff) was written with assistance.³ In this case it was successfully pleaded, that, whatever favourable interpretation wills may receive when once solemnly completed, it is absolutely necessary that the rules of law as to their execution should be exactly observed. The subscription must be *bonâ fide* the party's own. In a case where the granter had been in use to sign by initials only, and had, on the deed before the Court, written his name *ad longum* upon marks, or scores, which another person had drawn with a pen or wire, the deed was reduced.⁴

These cases are, however, to be contrasted with that of Wilson.⁵ A settlement of moveables was brought to be executed by a woman, Ann Wilson, who was very ill and in bed. Mr. Lawrie, the writer of the deed, asked her if she could write: she said 'She would try.' He then wrote the words, 'A. Wilson,' on a slip of paper, and desired her to try whether she could write the same words. She accordingly sat up in her bed, and wrote 'A. Wilson' on the same piece of paper, and just under the words written by Mr. Lawrie. 'Lawrie next laid the deed before her, and, at top of it, the slip of paper as written by him and her; and she then, without leading of the pen, or any touching or supporting of her hand or arm, or the tracing of any mark for her on the paper, adhibited her subscription, "A Wilson." The letters were coarse and unshapely, but distinct and fully formed, and such as could not have been written by any one who had not been in the use of subscribing her name. More-

¹ Dunlop, 2d Nov. 1863, 2 Macph. 1.

² Robertson, 20th December 1744, Elch. voce Writ, No. 18; Ballingall, 22d May 1806, Hume, 916; and Wilson, 24th Feb. 1814, Hume, 923.

³ Moncrieff, 14th July 1710, M. 15,936, affirmed 15th May 1711, Robertson's App. 26.

⁴ Crosbie, 30th Nov. 1749, M. 16,814.

⁵ Wilson, 28th May 1800, Hume, 912.

‘over, this subscription of hers bore no likeness to Lawrie’s hand, and was ‘nowise an imitation of, or drawing after, her name, as written by him, ‘but was a proper subscription of her own.’ The deed was sustained.

The report of this case is worthy of careful perusal, and the following *N.B.*, subjoined thereto by Baron Hume, is, like all his observations, very instructive :—‘The direction in the Act 1540, cap. 117, is, to employ the hand of a notary only “if the party cannot write;” and to ‘avoid this necessity, it is not requisite the party be able to write a free ‘and current hand, or easily to despatch a writing of some length. It is ‘sufficient that he can write his name and surname, in such a uniform ‘and distinct way as gives the subscription a character of its own, and ‘affords the means of detecting falsehood *comparatione literarum*. In ‘the present instance, Lawrie (the professional man employed) could not ‘properly have called in a notary after he had asked the testator whether ‘she could write, and had seen her make the trial and succeed. In the ‘case of Crosbie, the party only blackened the writing, previously executed ‘by another, with a pen on the paper. There was thus an utter want of ‘uniform and proper character of hand.’

NOTARIAL
SUBSCRIPTION.

2. I now proceed to the subscription of a notary, or notaries, for the party when he cannot write.

The Statute 1540, cap. 117, required, when the party could not write, the subscription of one notary for him, without in express terms appointing witnesses to the notary’s subscription. The Act 1579, cap. 80, required that deeds, by parties who could not subscribe, should be subscribed by two notaries before four witnesses. And the Act 1681, cap. 5, requires the witnesses to see or hear the party give warrant to a notary, or notaries, to subscribe for him, and in evidence thereof touch the notary’s pen.

1540, c. 117.

1579, c. 80.

The first of these Acts made no distinction between deeds as relating to heritage or moveables, or as ‘of great importance,’ or otherwise. The second is applicable specifically to a variety of deeds, and generally to ‘all writs importing heritabil titil, or utheris bandes and obligationes of ‘great importance.’ This term has been found, by a train of decisions, to apply to bonds or obligations relating to sums exceeding the amount or value of £100 Scots, or £8, 6s. 8d. sterling, calculated with reference to the obligant. Thus a person who cannot subscribe, granting a bond or obligation for more than £50 Scots, or £4, 3s. 4d. sterling, to each of two or more individuals, requires two notaries to sign for him, and four witnesses to attest his warrant to the notaries, and their subscriptions. Bonds or obligations (not importing heritable title), for sums of less amount or value than £100 Scots, can be validly executed, for parties unable to write, by one notary, before two witnesses. It has also been found that a bond, granted merely in corroboration or satisfaction of a former obligation, is not a ‘writing of importance,’ though the first obligation should have extended beyond £100 Scots.¹ Testaments, moreover, that is,

TESTAMENTS.

¹ Erskine, iii. 2. 10; Jack, 13th Dec. 1671, M. 12,975 & 16,836.

deeds executed *intuitu mortis*, applicable to moveable or personal estate only, are valid when duly executed by one notary in presence of two witnesses; although the inventory—that is, the estate and legacies conveyed—is above the amount with reference to which a bond or obligation so subscribed could be sustained.¹ In Stoddart's case the judgment was unanimous. With reference to this subject, Erskine says,² 'Let the subject of a testament be ever so valuable, one notary signing for the testator, with two witnesses, is sufficient.' Lord Stair says,³ 'The effect of testaments being so small, the solemnities thereof are no other than what are necessary to accomplish any other writ.' This is by no means a satisfactory mode of stating the law; but Stair goes on to add, 'If the testator cannot, or be not able through sickness to write, a testament will be sufficient by a notary and two witnesses, notwithstanding of the Act 1579, cap. 80, requiring to writs of importance two notaries and four witnesses, which holds not in testaments, though containing matter of great importance.' The conclusion of this passage is distinct and explicit. In reference to the subject of attestation by witnesses, Professor Bell⁴ says, to the same effect, 'four witnesses are not required in testamentary writings; two are declared sufficient;' and it is evidently implied in what he says that one notary is sufficient. Professor Menzies⁵ gives a clear and distinct opinion to the same effect; referring to Tait on Evidence in addition to the other authorities above cited. The same rule of law is laid down by Mr. Dickson, in his work on the *Law of Evidence*.⁶ Authority, therefore, and certainly practice also, are in favour of testaments so executed; and the privilege, to be afterwards more fully noticed, allowed by law to every parish minister in Scotland to act within his parish as a notary in the execution of testaments, corroborates the view that one notary is sufficient in any case. There are rarely two ministers in a parish. It is necessary, however, to call your attention to a doubt as to the sufficiency of execution by one notary before two witnesses only, when the testament disposes of a sum exceeding £100 Scots, suggested by the late Lord Justice-Clerk Hope in the case of Galletly.⁷ This case had reference to a last will and testament, by one who could not write, bequeathing between £200 and £300 sterling in money. His Lordship observed that a point of great importance was raised in the record, viz., the question, whether a deed, like that before the Court, 'could, by the law of Scotland, be validly executed by only one notary and two witnesses, instead of two notaries and four witnesses.' The defender maintained that, the deed in question being a will, one notary and two witnesses were sufficient; but the Lord Justice-Clerk said 'he did not think the point was wholly fixed by the authorities quoted.' This question was

¹ Bog, 18th Jan. 1623, M. 16,960, and Stoddart, 18th Dec. 1799, M. 16,857.

² Erskine, iii. 2. 23.

³ Stair, iii. 8. 34.

⁴ Bell's Commentaries, i. 324, 5th edition.

⁵ Menzies, p. 141.

⁶ Dickson on Evidence, i. 404.

⁷ Galletly, 1st Aug. 1843, 6 D. 1.

in consequence reserved, and the case was compromised. We have thus a point of great practical importance placed in a position not altogether satisfactory. How we are to deal with it must depend on the confidence we have in the authorities. On these I have myself the fullest reliance; but any one who is in doubt on the subject can exclude the risk of question, by taking the assistance of two notaries in presence of four witnesses.

NOTARIES ACT
HERE AS MAN-
DATORIES.

Subscription by the intervention of notaries is truly that of mandatories for the principal party; and—(1.) Each of the notaries ought personally to know the party, or to have his identity duly certified. By Act of Sederunt, 21st July 1688, notaries are prohibited from subscribing writs for persons who cannot write, unless it either consist with the notaries' knowledge, that he for whom, and at whose command, they subscribe, is the person designed in the writ; or that the same be attested by the subscribing witnesses, or by other credible persons; and which the notary is to mention when he subscribes for the party. (2.) In evidence of giving warrant to each of the notaries, the party must touch their pens. After this warrant has been duly given, the notaries subscribe each page of the deed, adding to their subscriptions the letters *N. P.*, being the initial letters of the words Notary-Public; and on the last page, a docquet or certificate is subjoined, in the handwriting of one of them, in which they are described as notaries-public and co-notaries in the premises. The notaries subscribe this docquet, each adding the letters *N. P.* to his subscription. They do not on such occasions prefix their mottoes; but they ought to be careful to make use of the subscription adopted by them on admission to their office. In giving warrant to the notaries, it is essential that the party shall touch their pens, but it is not necessary that the docquet shall state more than that the warrant was given.¹ In the cases noted the docquets stated only that the notary acted at command of the party, which was held sufficient, according to the maxim, *omnia presumuntur solenniter acta*. The giving of warrant, however, must be expressly stated.² Sometimes, in place of the notaries making out a joint docquet, each of them adhibits a separate docquet, in which case the leading docquet must, and the second ought to, bear that the warrant was duly given. But, when the first notary said '*de mandato*,' it was found that the co-notary need not repeat these words.³ In Gordon's case the second docquet, which was holograph of the notary, was sustained, though not subscribed by him. And in the earlier case of Cullen,⁴ the objection to a writ, attested by notaries, that they had not subscribed their attestations, was repelled, the names of the notaries being at length in their attestations, which were separate and holograph. But the omission to subscribe, besides indicating want of due care, would, at the present day, be unsafe.

¹ Dallas, 13th Jan. 1704, M. 16,839 & 5677; Maver, 7th July 1710, M. 16,841.

² Williamson, 23d Feb. 1688, and M'Kenzie, Feb. 1688, M. 16,838.

³ Dewar, 17th Jan. 1682, M. 16,837; Gordon, 21st June 1765, M. 16,818.

⁴ Cullen, December 1731, M. 16,842.

It is not enough that the deed itself shall express the warrant to have been given. The fact must be certified in the notaries' docquet.¹ Kilkerran explains the reason of this. He says, 'Witnesses to a deed signed by notaries are not only witnesses to the subscription of the notary, but also to the command given him, both which the witnesses attest; and as witnesses are neither bound, nor supposed, in any case, to know what is contained in the body of the deed, they attest no more than what is in the docquet. The authority, also, to notaries must be given at the very time of executing the deed, for, till then, there is *locus penitentiae*; and, for anything that could appear from the face of the deed in question, it might have been written many days before signing. The docquets bearing merely *pro illo subscribo* was nothing, for though it may be true that the notary could not with truth say so, without his authority, yet that was but his assertion, which, whether true or false, is the very question.'

The subject of authenticating marginal additions, generally, will be considered in a subsequent Lecture. When such addition occurs in a deed to be signed by notaries, I have no doubt that the general mandate to sign the deed extends to marginal additions, as well as to what is in the body of the deed;² but, having regard to the case of Elliots,³ it appears advisable to obtain express warrant to sign the marginal addition, as well as the deed, and to express in the docquet that such warrant was given.

SHOULD MAN-
DATE EXPRESSLY
AUTHORISE
SIGNING OF
MARGINAL
ADDITIONS?

It is not essential, *de solennitate*, that the deed shall be read over to the party in presence of the notary, or notaries, and witnesses. But, in the case of Yorkstoun,⁴ it was observed on the Bench, that it may be often necessary that such reading should take place as a precaution against fraud, and that the witnesses may be able to establish the fact, if called on to do so. In practice, reading uniformly takes place, and it ought not in any case to be omitted.

The notaries, moreover, must act conjointly, and not separately. They must subscribe *unico contextu*; and the four witnesses must attest the subscription and facts all together, and not two by two, or separately, otherwise the deed will be reduced.⁵ But if the deed is duly signed by one of the two notaries, and his subscription is duly attested by two of the witnesses, the deed will be sustained to the extent of £100 Scots.⁶

NOTARIES
MUST ACT
CONJOINTLY.

The witnesses must see the notaries subscribe. The Act 1681, cap. 5, 1681, c. 5. allows acknowledgment of subscription to the witnesses, as an equivalent to the actual subscription in their presence, only with reference to the subscription of parties, not of notaries; and obviously for the reason stated by Kilkerran in the passage already quoted, that the witnesses, in

¹ Birrel, 18th June 1745, M. 16,846.

² Dickson, i. 388, and cases cited.

³ Elliots, 6th Dec. 1695, M. 16,838.

⁴ Yorkstoun and others, 2d Dec. 1794, M. 16,856.

⁵ White, 27th Dec. 1711, M. 16,841, and Rollands, 1st July 1767, M. 16,851.

⁶ Anderson, 24th Dec. 1700, M. 6843 & 16,840.

the case of subscription by notaries, attest not merely such subscription, but the giving of the authority to subscribe, which does not stand upon the mere assertion of the notary.

WHAT IF THE
PARTY IS TRULY
ABLE TO WRITE?

The statement, in the docquet, of the party's declaration of inability to write, proves only that such declaration was made, and does not establish the inability; but, in practice, both the declaration of the fact and cause of inability are in use to be inserted in the docquet; and it is proper to follow the general rule in this particular. When the party, on whose behalf notaries have signed, is able to write, the preponderance of authority is to the effect that he himself cannot set aside the deed, if he really gave authority to sign for him.¹ On this point you may refer also to the case of Campbell,² where a charter subscribed by one notary, alleging he had command of the granter because she affirmed she could not write, was found open to reduction by her, she offering to prove that she could write, and was in use to write and subscribe, both before and after the date of the deed; but although the report, which is very short, does not refer to any other ground of reduction, it is to be observed that this was a deed importing heritable title, for which reason alone it would seem to have been reducible, as subscribed by only one notary for the party.

In these cases, supposing it to be true that the parties could write, the deeds were not executed in strict accordance with the law. But, on the other hand, if the parties actually alleged that they could not write, and gave mandates in presence of the witnesses, authorising the notary or notaries to sign for them, it was reasonable that they should be barred, *personali exceptione*, from acting in the face of what they had themselves authorized.

Where third parties are concerned, the case is somewhat different. The question arose in a case of competition of creditors. In the case of Clark,³ reduction-improbation—that is, reduction on the ground of forgery or falsehood—was pursued, of a contract subscribed by two notaries, for a party who in ordinary health could write, but at the date of signing was unable to do so by reason of sickness, as the docquet expressed. The Court required the holder of the contract to prove that the party, at the time of subscribing, was so sick that he could not subscribe his name. The report does not mention the final issue of the case.

From these cases we see the importance of the Act of Sederunt of 1688, prohibiting notaries from subscribing writs for persons who cannot write, without adequate knowledge or evidence as to the parties' identity. Subscription for another is a very solemn act, intended to draw after it important consequences. And, independently altogether of the statutory prohibition, no one ought to adhibit his name, and give the weight of his character and official position, to any document, without having good

¹ Littlejohn, 8th Dec. 1608, M. 16,828,
and Veitch, 31st Jan. 1637, M. 16,834.

² Campbell, 3d March 1610, M. 16,828.

³ Clark, 3d Jan. 1683, M. 16,837-8.

reason to believe that he is called on to do so by the right party, and on sufficient grounds.

The notary, who acts officially in the execution of a deed, ought to have no concern with the deed in any other way.¹ An opposite decision was pronounced in a case similar to Gormock's,² but the deed there was sustained because of the insignificance of the sum to which it related, and for other exceptional reasons. And the law on the subject, as settled in Gormock's case, was recently confirmed, after the most careful consideration, in the case of Ferrie.³ Here it was held that a trust-disposition and settlement was invalid, in respect that one of the notaries by whom it bore to be signed, as in place of, and authorized by, the testator, was one of the trust disponees and executors under the deed, although he had no patrimonial interest under it, and merely had the ordinary rights and powers of a testamentary trustee.

NOTARY OUGHT
TO HAVE NO
CONCERN WITH
THE DEED.

In the case of mutual contracts, the same notary is not entitled to subscribe for both the parties. If neither party can subscribe, each ought to be separately represented.⁴

The minister of a parish may officiate as a notary, in making the testament of a person dwelling in his parish. In reference to this privilege, Erskine says,⁵ 'It was not unusual for clergymen to enter notaries before the Reformation; but ministers (by which are meant parochial presbyters) are by 1584, cap. 133, disabled from exercising any civil office, as of Judge, Advocate, or Notary, except in the case of testaments. The power which was continued to ministers by this Act, in the special matter of testaments, was originally intended for the single purpose of authorising the attestation of testaments by such churchmen as had regularly entered notaries; but custom has long extended it, without distinction, to all ministers, because they are obliged by their office to be frequently with dying persons when notaries cannot easily be got.' This privilege, however, seems to belong exclusively to the minister of the parish where the party dwells at the time the testament is made, if such minister is then in the parish.⁶ The minister ought to obtain warrant from the party to attest the facts, and subscribe his own name in the same way as an ordinary notary. In one case, a minister, following, as it was said, the custom of the district, subscribed the party's name, in place of his own, to a testament; showing, however, in the testing clause of the deed, which was in his own handwriting, that all necessary formalities had been observed. The cause was superseded till the minister annexed an attestation, as a notary, of his having subscribed, and the testament was then sustained.⁷

PARISH MINISTER
CAN ACT
AS NOTARY IN
MAKING A
TESTAMENT.

The rule requiring the subscription of two notaries for parties who cannot write, and the presence of four witnesses to attest their authority

AFFIDAVITS.

¹ Gormock, April 1583, M. 16,874.

⁵ Erskine, iii. 2. 23.

² Gibson, 29th Jan. 1629, M. 16,879.

⁶ Hepburn, 31st Jan. 1606, M. 16,827.

³ Ferrie, 23d Jan. 1863, 1 Macph. 291.

⁷ Trail, 27th Feb. 1805, F. C. & M.

⁴ Craig, 27th June 1610, M. 16,829.

15,955.

and the fact of their subscription, does not extend to affidavits, taken before magistrates, by parties who cannot write. These are judicial acts, which, in such cases, are duly proved by the subscription of the magistrate, and a statement by the party in his affidavit that he cannot write. An affidavit and claim in a sequestration, authenticated as above, was sustained; but a mandate by the same party, giving authority to vote in the sequestration, was authenticated by two notaries in presence of four witnesses.¹

DEEDS BY
BLIND PERSONS.

3. We shall now consider the mode of executing deeds by blind persons, including, as of that class, persons so blind that they cannot see what they are subscribing, or distinguish their own names when subscribed. Such persons, when they can write, can execute deeds in the same manner as if they could see, and had their power of vision unimpaired.² In Couts' case, a writ, subscribed by a person who was blind, being challenged as not probative, he not being capable to know to what he set his name, the objection was repelled, in respect that a blind person has the same access to be informed, which they have who see and cannot read.

The judgment in Lord Fife's case settled,—

- (1.) That the subscription of the party is the proper legal subscription, where he can write.
- (2.) That the subscribing party is presumed to know the contents of the deed.
- (3.) That, to impeach the deed, as not his deed, it must be proved that he did not know its contents when he subscribed it.
- (4.) That previous reading of the deed to the party is not a necessary solemnity. But
- (5.) The non-reading of the deed to the party, though it is evidence to be received, is not conclusive evidence that he did not know its contents.

This decision corrected two previous cases,³ in which the Court of Session reduced deeds subscribed by blind persons, or by notaries for them, where it could not be proved that the deeds had been previously read over to the parties.

But though deeds by blind persons, who are able to sign their names, can be executed without the intervention of notaries, such intervention is not excluded. It is in the option of such parties either to subscribe in the ordinary way, or to take the assistance of notaries, as in the case of persons who cannot write.⁴ In Reid's case, a party, at the dates of certain deeds of settlement sought to be reduced, could subscribe his name, and was in the practice of subscribing it, to writings requiring his subscription.

¹ Paul, 13th Feb. 1834, 12 Sh. 431.

² Couts, 21st June 1681, M. 12,601; Earl of Fife, 30th Nov. 1819, F. C., reversed 17th July 1823, 1 Sh. App. 498; and Ker, 23d May 1837, 15 Sh. 983.

³ Earl of March, 16th Dec. 1735, 5 Br.

Sup. 840; and Ross's Trustees, 3d July 1792, M. 16,853.

⁴ Reid, 19th Dec. 1837, 16 Sh. 273; continuation of Reid, 7th July 1835, 13 Sh. 1063.

He was at said dates not totally blind, but his sight was so defective that he could not read any written document, nor decipher the subscriptions attached to it. The deeds of settlement had been subscribed by two notaries; and with reference to one of the deeds, dated in 1822,—prior to the decision of the House of Lords in Lord Fife's case, which was in 1823,—the docquet bore that Reid, 'from a defect of sight, or dimness of vision, cannot see to read writing clearly, as he asserts,' and was 'desirous to execute the foregoing deed in a valid form, so as to exclude challenges on the head of blindness or defect of sight.' With regard to another dated in 1825, the docquet stated that Reid, 'from a defect of sight or dimness of vision, cannot see to read writing, as he asserts.' The docquet, you will observe, did not state that he could not write; in point of fact he could do so. But the Court unanimously sustained the deeds. When this case was before the Court in 1835, Lord Glenlee is reported to have observed, that the judgment of the House of Lords, in Lord Fife's case, gives no countenance to the idea that a man totally blind can legally execute a deed without notaries, but only that one in the situation of Lord Fife could and ought to subscribe his own deed. The question in Reid's case he is stated to have held as turning on Reid's defective power of seeing. I am inclined to doubt the correctness of this report of Lord Glenlee's views; as Lord Fife's case establishes that, in respect of the Statutes regarding the subscription of deeds, all persons who can write ought to authenticate their deeds by their own subscriptions. In fact there is no statutory solemnity applicable to the blind, as contradistinguished from other parties. Lord Moncreiff, the Lord Ordinary in Ker's case, speaks distinctly to this effect in a note, the whole of which I recommend to your perusal. He says, 'The law appears to the Lord Ordinary to be very plain. Blindness is no statutory objection. The judgment of the House of Lords, in the Fife case, decided that, by itself at least, it is no objection at all.'

I have always felt, however, that the execution of deeds by blind persons themselves, and without notaries, is somewhat unsatisfactory; the parties are so much in the hands of those about them, and unable to identify the deed they put their names to, with that which they intend to subscribe, whether read over to them or not; and I think the safe practical rule, even when parties can write their names, is to get their deeds authenticated by notaries, as well as by their own subscriptions.

I have already said, that, as a matter of propriety, plainly recommended by the words of the judgment in Lord Fife's case, and in accordance with custom, the deeds should be read over to the parties, in presence of the witnesses, before they are subscribed, and that the fact of such previous reading should be stated in the notaries' docquet. Notaries should also, when executing such deeds, express in their docquet, with the utmost accuracy, the true state of the granter's defect of vision, as explained by himself. Professor Menzies¹ advises that the witnesses to

¹ Menzies, p. 109.

subscriptions by blind persons should see them actually sign, and not be satisfied with their acknowledgment, as is competent in ordinary cases. I am sure you will all see the soundness of that advice.

**SUBSCRIPTION
BY INITIALS.**

4. Hitherto we have been considering the subscription of deeds which are *per se* probative, as being executed with all the statutory solemnities. We now pass to a class which, though not probative *per se*, may be admitted to proof, viz.,—deeds subscribed by the initial letters of the parties' name and surname. Subscription by initials is thought, by Erskine¹ and Ross,² contrary both to the words and spirit of the Acts of 1540, 1579, and 1672, because a party who can subscribe only the initial letters of his name can hardly be said to be able to write. But their views have not been supported by decisions.

In one case of very old date, it was held enough to prove the verity of the subscription by the witnesses.³ And, where the party did not deny the initials to be hers, an obligation so signed was sustained.⁴ Sir George Mackenzie speaks of the custom of so subscribing, as all that required to be proved to support the deed.⁵ It is necessary, however, to prove both that the party did subscribe the particular deed by initials, and (if the case admits of proving custom) that he was in use to subscribe by initials only.⁶ This may sometimes be a difficult matter. In a case of reduction-improbation, the Court required proof on the first of these points by the instrumentary witnesses only; on the second, *prout de jure*.⁷ Supposing the witnesses to be dead, other evidence, if it could be had, would necessarily be admitted as to the actual subscription. But, to obviate such difficulties, it would be a good general rule, if the deed is not of minor importance, where parties can subscribe by initials only, to execute by means of notaries, besides having the party's initials subscribed as usual.

**SIGNING BY A
MARK.**

5. There is no known instance of a deed, which would require the solemnities of the Statutes, if the granter could write, having been sustained when authenticated by a mark only. The Court have in several cases refused to sustain deeds so signed.⁸ In Graham's case, the Lord Justice-Clerk Boyle said, 'I do not think this is a legal document at all. There is one mode, and one alone, of authenticating a document, 'when the party cannot write;' that is, by the aid of a notary or notaries, as already explained.

The rule is not the same in reference to bills and promissory-notes, as we shall by and bye see; but in regard to deeds it is absolute.⁹

¹ Erskine, iii. 2. 8.

² Ross's Lectures, i. 136.

³ Grierson, 14th Feb. 1633, M. 16,802.

⁴ Earl of Traquair, 16th Dec. 1724, M. 16,809.

⁵ Mackenzie's *Institutions of the Law of Scotland*, iii. 2. 4.

⁶ Ker, 20th Jan. 1693, M. 16,805; Weirs, 22d June 1813, F. C.

⁷ Coutts, 21st June 1681, M. 16,804.

⁸ Barber, 26th May 1790, Hume 906, discussed in the case of Din, 18th June 1812, reported in a note to the case of Weirs, before cited; Graham, 30th Nov. 1848, 11 D. 173; Crosbie, 2d June 1865, 3 Macph. 870.

⁹ Thomson on Bills, p. 48.

CHAPTER III.

PASSING now from subscription of party, we have to consider the WITNESSES' ATTESTATIONS.
rules applicable to the witnesses' attestations.

When a party subscribes, his subscription must be attested by two witnesses. The Act 1540, cap. 117, requires *witnesses* in such cases; using the plural number; and custom has established that two are enough. The Act 1579, cap. 80, requires that, when two notaries subscribe for the party, their subscriptions shall be attested by four witnesses. The witnesses in all cases act at the request of the parties. They require to be specially called to attest the subscriptions, and ought not to subscribe as witnesses until desired to do so.

The question, who may be an instrumentary witness, naturally occurs WHO MAY BE AN INSTRUMENTARY WITNESS?
here. In general, every male of the age of fourteen or upwards, and who is subject to no legal incapacity, is competent to be such witness. But, for obvious reasons, the law excludes pupils,¹ idiots, or furious persons,² and blind persons.³ Erskine⁴ says women likewise are excluded from being instrumentary witnesses. A person infamous in the eye of the law has been found not legally exceptionable as a witness to the execution of a mutual contract, the witness being chosen of mutual consent.⁵ Near relationship, or liability to undue influence, is not a good legal ground of objection to an instrumentary witness. We accordingly are not entitled to object to sons and brothers, as witnesses to their parents' and brothers' or sisters' deeds.

Though there are several parties to a deed, they cannot be witnesses PARTIES CAN- NOT ATTEST EACH OTHER'S SUBSCRIPTIONS.
to one another's subscriptions. Erskine⁶ says a deed subscribed by a number of persons, members of a corporate body, or even by a number of private persons, has been once and again adjudged effectual without witnesses; the parties being presumed to have been witnesses to each other's subscriptions; and he quotes in support of this doctrine the cases of Forrest⁷ and Seabox of Queensferry;⁸ but the former of these cases was decided on the ratio of the deed being *in re mercatorid*, and therefore in a class of writings which, as we shall see, are privileged as regards

¹ Davidson, 12th Dec. 1738, M. 16,899.

² Menzies, p. 113.

³ Cunningham, 2d July 1824, 3 Sh. 205.

⁴ Erskine, iv. 2. 27.

⁵ Baillie, 1st Feb. 1710, M. 16,891.

⁶ Erskine, iii. 2. 23.

⁷ Forrest, 19th July 1676, M. 16,970.

⁸ Seabox of Queensferry, 7th Jan. 1732, M. 16,899.

authentication; the report of the latter, given in Morison's Dictionary, consists of only two lines, and is altogether unsatisfactory. A full report of the case is given in Bell's *Lectures on the Attestation of Deeds*,¹ from which it appears at least doubtful if the point under consideration was settled as stated by Erskine. And a similar plea was rejected as untenable in the case of the Duke of Douglas,² and more recently in that of Miller.³ In this last case, Lord Corehouse, Ordinary, says that the doctrine, as stated by Erskine, appears ill founded, and pregnant with danger. It must, therefore, be understood as beyond dispute, that parties to a deed cannot be witnesses to one another's subscriptions.

GRANTEE CAN-
NOT ATTEST
DEED IN HIS
OWN FAVOUR.

The grantee cannot be one of the witnesses to the deed in his own favour.⁴ One of the two notaries subscribing for a party cannot be one of the witnesses to the subscriptions of himself and his co-notary as for the party.⁵ It is only as co-notaries that the two notaries are the legal substitute for the party; and it is equally incompetent for the one to attest the subscription of the other, as for a party to attest his own subscription. A testament, however, was sustained where one of the witnesses was a considerable legatee;⁶ and another, where each of the two subscribing witnesses was a legatee for £5, and one of them was one of three executors;⁷ and a trustee, nominated by a deed, but who had no patrimonial interest under the deed, was found competent to be an instrumentary witness to it.⁸ It is clearly advisable, however, to select witnesses who are of good character, not near relations of the parties, and generally above all remark. I apprehend also, that any one interested in the deed should be held as excluded from being witness to it. The recent Acts for amending the Law of Evidence in Scotland, and in which interest no longer excludes a witness from being examined, in a law suit, to prove a fact, have reference solely to judicial proceedings, and leave the law as to instrumentary witnesses just as it was.

WITNESSES
MUST SUBSCRIBE
WITHOUT ASSIST-
ANCE:

MUST ADE-
QUATELY KNOW
THE PARTY.

The witnesses must themselves subscribe without assistance. The name of an instrumentary witness, written by a third party, while the witness merely touched the pen, is not a genuine subscription.⁹ They are required by the Act 1681, cap. 5, to know the party; and they must have at least credible information that he whose subscription they attest is truly the person designed in the writ. Where one of the witnesses to a bond, a boy of fourteen, had been called off the street to attest the party's subscription, and he deponed that he did not know the party, the Lords, though convinced the bond and debtor's subscription were true, yet, in respect of the Act of Parliament, found the bond null.¹⁰

It is not necessary that the witnesses shall have personal knowledge of the party. It is enough that they have credible information that the

¹ Bell's Lectures, p. 90.

² Duke of Douglas, 1st Nov. 1746 and 6th Jan. 1747, M. 17,033 & 17,035, and Elch. voce Writ, 11.

³ Miller, 29th May 1835, 13 Sh. 838.

⁴ Robertson, 21st Nov. 1627, M. 16,879.

⁵ Lackie, 20th Nov. 1627, M. 16,878.

⁶ Grahame, March 1685, M. 16,887.

⁷ Ingram, 22d Jan. 1801, M. App. voce Writ, 2.

⁸ Mitchell, 30th Nov. 1742, M. 16,900.

⁹ Setton, 24th Feb. 1816, 1 Murray's *Jury Court Reports*, 9.

¹⁰ Campbell, Nov. 1698, M. 16,887.

subscriber is 'the true person' designed in the writ.¹ The Act of Sederunt,² in reference to the knowledge required on the part of notaries who subscribe for parties unable to write, was founded on in the pleadings in Walker's case; and the terms of the judgment appear to indicate that the Court held similar knowledge to be what is required on the part of the witnesses; the object of the provision under consideration in the Act 1681 being to prevent personation. The party must subscribe in presence of, or he must acknowledge his subscription to, both of the witnesses; or else subscribe in presence of the one, and acknowledge his subscription to the other. And, in cases where the subscription is witnessed upon acknowledgment, the acknowledgment must be clear and explicit.³ It is usual and right for the witnesses, in all cases, to subscribe at once, and without delay, after the party has subscribed in their presence, or acknowledged his subscription to them. But immediate subscription is not essential on the part of a witness who has seen the subscription of the party adhibited. Such witnesses may sign after the lapse of an interval of time, and the one may sign on one day and the other on another day. It may seem, at first sight, that a contrary doctrine was laid down in the case of Home;⁴ but that case is evidently special. The deed there was a mutual contract: the parties had subscribed it, but they had not desired or authorized the witnesses to subscribe. The parties left the deed, designedly thus incomplete, in the hands of one of the witnesses; and, until called upon by both parties, neither he nor the other witness ought to have subscribed. Some days afterwards, however, the two witnesses put their names to the deed, as witnesses, at the instigation of one of the parties, and without the authority of the other. The witnesses thus took upon themselves, at the desire of one of the parties, to do what required the joint desire of both. The Lords found the deed null, because the parties, having broken up without perfecting their contract, were free, and could afterwards be bound only by a new act of their own, interposing their consent to the subscription of the witnesses. Professor Menzies⁵ shows plainly, I think, that the ground of nullity in this case did not consist in the witnesses' not subscribing at once, but in the fact that the parties had not settled the transaction when the witnesses subscribed, and that it was intended and understood that the witnesses should not have subscribed without authority from both the parties. Where the deed is attested wholly or in part upon the granter's acknowledgment of his subscription, the two witnesses, if both attest upon such acknowledgment, or such one of them as so attests, must subscribe at the time of the acknowledgment.⁶

Subscription being a single act, the witnesses who saw the party subscribe must have been present together at the time when the deed was

¹ Walker, 8th June 1716, M. 16,896.

² Act of Sederunt, 21st July 1688.

³ Earl of Fife, cited in p. 52, Note 2.

⁴ Home, June 1730, M. 16,898.

⁵ Menzies, p. 119.

⁶ Lord President M'Neill in Hogg, 12th March 1864, 2 Macph. 848.

executed ; but it is not necessary, in point of solemnity, that the witnesses to whom the granter has acknowledged his subscription should have been in presence of each other when he did so.¹ Neither is it necessary, in point of solemnity, that both or either of the witnesses should in any case subscribe in presence of the party.² In order, however, to fix the date of the deed (which in some cases is a point of great importance), it would seem that the acknowledgment to both of the witnesses, if neither has seen the party subscribe, must be on the same day ; and, where one witness has seen the party subscribe, and the acknowledgment is made to the other only, the subscription and acknowledgment should be on the same day.

RE-EXECUTION.

It sometimes happens that a deed, after being subscribed by the party and witnesses, but before being further completed, requires to be written over in part, of new, with alterations ; in which case the whole deed, as altered, must be authenticated by subscribing the whole, just as if no part had been previously subscribed ; or by subscribing the part written over, and acknowledging the original subscriptions to what is not written over ; or by acknowledging the subscriptions to the whole, in presence of two witnesses ; or by subscribing in presence of one and acknowledging the subscriptions to the other. The witnesses, even though the same as on the first occasion, and though they have already subscribed, must subscribe upon the re-execution, as that is the true execution of the deed ; the former subscriptions by the witnesses having reference to the first subscription by the party ; and there being no authority for accepting from the witnesses the acknowledgment of their former subscriptions.

It is absolutely necessary that the party shall adhibit or acknowledge his subscription in presence of the witnesses. It is not enough that the party shall acknowledge his subscription to be genuine, or that the witnesses are able to say they know the party's subscription. It is consequently a relevant inquiry, in all questions concerning the due execution of a deed subscribed by the party himself, whether, in point of fact, both or either of the persons who subscribed as instrumental witnesses did not see him subscribe, or hear him acknowledge his subscription. In order to reduction of a deed on the ground that the witnesses, or one or other of them, did neither see the subscription made, nor hear it acknowledged, both these averments must be proved. Where a question is raised as to that point of fact, the decision will depend on the nature and extent of the evidence which can be adduced to contradict the solemn written attestation of the witnesses contained in their subscriptions to the deed. When a deed is *ex facie* regularly executed, there arises a strong legal presumption in its favour, and it lies upon him who attempts a reduction of it, to establish his objection by legal evidence. It is obviously necessary, therefore, that the evidence,

¹ Robertson, 1st Dec. 1823, 2 Sh. 544 ;
and Hogg, cited in p. 49, Note ⁶.

² Frank, 3d March 1795, M. 16,824 ;
and Condie, 26th June 1823, 2 Sh. 432.

in contradiction of the *ex facie* regular deed, shall be clear and decisive,—otherwise deeds and rights, involving as they often do most valuable interests, would be exposed to formidable risks. Lord Gifford says, on this point, that contradictory evidence ought to be overpowering;¹ and an opinion to the like effect was expressed by Lord Corehouse in the case of Cleland.² On the point of evidence, however, every case must stand on its own merits. It was at one time questioned whether the instrumentary witnesses could be examined to contradict orally what they had attested in writing; but it has been decided, and is now beyond all dispute, that their examination is admissible.³ Their credibility, however, supposing them to give evidence which will criminate themselves, and which they may refuse to give, if they think fit, is altogether a different point. Their evidence will in all cases be taken with caution; a mere want of recollection will go for nothing.⁴ It may be held as next to certain that the Court will not rely upon their evidence alone; and, even where it is explicit and distinct, will look for other and unexceptionable testimony in confirmation of it. Thus, in Frank's case, one of the witnesses deposed, *ex intervallo*, that he had neither seen the party sign, nor heard him acknowledge his subscription; but the Court disregarded his testimony.

It is difficult to reconcile the decision in Smith's case, as reported in the Faculty Collection, with others, particularly that in the case of the Earl of Fife, to be immediately noticed; but, in Lord Fife's case, Smith's was stated to be special by Lord Glenlee, whose opinion was concurred in by Lords Pitmilley and Alloway. And I have had occasion to see a note, by the late Lord Cockburn, to the effect, that 'the pleadings and the judgment of the Court in the case of Lord Fife show that no such opinion (as that stated in the Faculty Collection) was held by any one Judge, and that the Faculty Report is totally inaccurate.'

A similar question again arose,⁵ in a case of acknowledgment of subscription to two deeds, where one of the witnesses deposed that he neither saw the parties subscribe, nor heard them acknowledge their subscriptions; the other, that he did not remember their subscribing or acknowledging in his presence, and thought he could say decidedly they did not. The deeds had been subscribed by the parties and witnesses in presence of the son of the law-agent who prepared them, and to whom they were carried back by his son after execution, whereupon the agent himself immediately filled up the testing clause of one deed, and his son that of the other; and these clauses bore that the deeds had been executed in presence of the two witnesses. The

¹ Smith, 25th Jan. 1821, F. C., affirmed 4th June 1824, 2 Sh. App. 265.

² Cleland, 6th July 1837, 15 Sh. 1246, and 15th Dec. 1838, 1 D. 254.

³ Frank, above cited. Swany, 12th Dec. 1807, M. App. voce Writ, No. 7, and Lord

Mackenzie and Lord Corehouse in Cleland's case.

⁴ Sim, 23d Nov. 1708, M. 16,891; Sibbald, 18th Jan. 1776, M. 16,906; and Lord Justice-Clerk Inglis in Morrison, 27th Feb. 1862, 24 D. 625.

⁵ Condie, 26th June 1823, 2 Sh. 432.

Lord Ordinary found the objection to the due authentication of the deeds not established by satisfactory evidence, and the Court ultimately (after a contrary judgment) adhered by a majority,—considering that great weight was to be given to the real evidence arising from the statements in the testing clauses, as these had been completed *de recenti*, and from the knowledge of a person who was present at the execution. This was a narrow case, and probably if the filling up of the testing clauses had been delayed for any length of time, the deeds would have been reduced.

In Cleland's case, although both of the witnesses deponed that they had neither seen the party subscribe, nor heard him acknowledge his subscription—(they, in fact, deponed that when they subscribed as witnesses, the party had not himself subscribed),—their evidence being unsupported by other testimony, and clearly ultroneous, the Court refused to reduce the deed.

An opposite result arose in a case¹ where both the persons stated as instrumentary witnesses swore positively that they never saw the granter, and that he was not in the house with them when they subscribed. One of them had taken notice of his absence, and neither of them could recollect whether his name was at the deed when they subscribed. There were, moreover, other unfavourable circumstances; and the deed was reduced.

In the Earl of Fife's case,² it was proved before a jury that one of the two persons stated as witnesses in the testing clause of certain deeds, and each of whom subscribed the deeds in the character of witness, had neither seen the deeds subscribed, nor heard the party acknowledge his subscription; and the deeds were reduced, the Court holding them in the same situation as if they had been subscribed before one witness only. An argument was here attempted, to the effect that the Act 1681 only provided for the punishment of the person who subscribed as witness, but was not really so, and did not provide for the nullity of the deed; and that therefore the deeds were not null; but the decision settled, that a deed is null where one of the alleged witnesses neither saw the granter subscribe, nor heard him acknowledge his subscription.

The cases of Allan and the Earl of Fife are not to be held as contradicting any of the other cases above cited, or as contradicted by them. In every case when a deed, *ex facie* regular and complete, is challenged, as not executed according to the requisite solemnities, the result depends upon the evidence which can be adduced in proof of the alleged irregularity. But in so important a matter as the due authentication of a deed, and where the interests of third parties are so often implicitly intrusted to practitioners, we ought carefully to see every form observed promptly and accurately. The immediate completion of the testing clauses was specially founded on by the Judges in support of the deeds in Condie's case.

¹ Allan, 21st Dec. 1803, Hume, p. 914.

² Earl of Fife, 22d Dec. 1825, F. C., and

4 Sh. 340, affirmed 22d May 1826, 2 Wil. and Sh. 166.

It is the practice of some banks to have their bonds subscribed in their own office, or in presence of at least one person connected with the bank, who will see to the due execution of the deed in all points; and such a practice may be followed by the agents of private parties, in many cases, with great ease and advantage. The case of Smith, in which the deed was ultimately sustained, shows that due attention at the outset may save years of anxiety and doubt. The deed under reduction in that case was before the Court of Session in three several actions, two of which went to the House of Lords; and Lord Fife's case, in which the deed was reduced, ran the course of the Courts, on a point regarding the non-observance of the most simple forms.

I have already quoted the advice of Professor Menzies as to seeing the subscription of blind persons adhibited, and not taking acknowledgment of subscription in such cases; and in the execution of deeds by old or infirm persons, or those who from any cause are not ready writers, I strongly recommend you not to rest satisfied with acknowledgments, but to see the subscription actually adhibited. This may prevent all risk of the allegation that the party received assistance, or did not actually subscribe.

It is the usual and correct practice for each witness to add the word 'witness' to his subscription; and in deeds, such as accessions by creditors to their debtor's trust-deed, where the parties are named and designed in the testing clause only, it is important that this word should be added, to distinguish the witnesses from the parties. The addition of this word has also been found of importance in supplementing testing clauses defectively expressed.¹ But the addition is not a statutory requisite, and, in ordinary circumstances, is not absolutely necessary.² I need hardly, however, say that the omission should not be allowed when the word can conveniently be supplied.

Each witness must subscribe his surname at length, and not merely by initials. The case of Meek³ related to the execution of a summons; but there is no reason to doubt that the same rule would be applied to the witness in a deed. The Christian name may be abbreviated or signed by its initial letter, as in the case of subscription by parties.

The instrumentary witnesses, in deeds subscribed by the parties themselves, and which at the time of subscription are free of any blank intended to be filled up before delivery of the deeds, are called to attest merely the subscription of the party, and they ought not to be, and in practice are not, informed of the subject-matter of the deed.⁴ Where there is any blank in the deed at the time of subscription, the witnesses ought to see the same filled up, either then or before delivery.⁵

In the case of the intervention of notaries, the witnesses attest not

¹ Doig, 9th Jan. 1741, M. 16,900, and Wemyss, 5th June 1821, 1 Sh. 47, affirmed 19th April 1825, 1 Wil. and Sh. 140.

and Lord Blantyre, Petitioner, 5th July 1950, 13 D. 40.

² Meek, 18th June 1707, M. 16,806.

⁴ Ormistoun, 21st July 1708, M. 16,890.

³ Morison, 23d Feb. 1694, 4 Br. Sup. 163,

⁵ 1696, cap. 25.

merely the subscription of the notaries, but also the fact of authority having been duly given by the party to the notaries to subscribe for him, and of the reading of the deed in hearing of the party, notaries, and witnesses, before execution, if such reading takes place. A deed was accordingly reduced, where two of the four subscribing witnesses deponed that they did not hear the granter say she could not write, nor give the notaries authority to subscribe, nor see her touch their pen; and a third witness deponed that he did not hear her declare she could not write, or give any orders to subscribe for her.¹ It was here observed on the Bench, that 'in the case of notaries the greatest strictness ought to be observed, and they ought not to be allowed to dispense with any part of the strict forms.'

Where two or more persons subscribe a deed at the same time and place, or where one executes by a notary or notaries, and the others by their own subscriptions, there is no occasion for separate witnesses; or that the witnesses to both subscriptions should subscribe more than once. In the case of *Hardies*,² the docquet of the notary, signing for one of the parties, was immediately subjoined to the signature adhibited by the other party; and it was thought of importance that the witnesses subscribed at the side opposite to the docquet, and not above the docquet.

DESIGNATION
OF WITNESSES.

We now pass to the subject of the witnesses' designations or descriptions.

The Act of 1579 requires the four witnesses to the subscriptions of notaries to be 'denominat be their special dwelling-places, or sum uther evident tokens, that the witnesses may be knawen;' and that of 1681 declares, that all writs to be subscribed thereafter, wherein the writer and witnesses are not designed, shall be null.

CONDESCEND-
ENCE PROHI-
BITED.

The older practice, of supplying the names and designations of the witnesses by condescendence, was prohibited by the last-mentioned Act; and a deed, though duly subscribed by the party and witnesses, yet if wanting the names and designations of the witnesses, is not obligatory.³ There are many decisions to this effect.

The most correct form of designation is that which gives the Christian name and surname, the profession or occupation, and the residence. But the essential point is to give such a designation or description as shall distinguish the individual who has acted as witness from all other individuals. Of course, that may be done differently in different circumstances, but it ought to be done. It is clearly fatal to insert either an incorrect Christian name or an incorrect surname.⁴ In *Archibald's* case, the witness, whose proper name was 'Hill,' but who was familiarly known by the name of 'Hillock,' signed by the name of 'Hill,' and was designed in the deed by that of 'Hillock;' and the deed

¹ *Farmers*, 25th June 1760, M. 16,849.

² *Hardie*, 6th Dec. 1810, F. C.

³ *Russel*, 17th Dec. 1766, M. 16,904.

⁴ *Bell's Lectures on Attestation of Deeds*,

79; *Abercromby*, 15th July 1707, M. 17,022; *Douglas, Heron, & Co.*, 28th

Nov. 1787, M. 16,908; and *Archibald*, 17th Dec. 1787, M. 16,907.

was reduced. An incorrect designation is equally fatal. In another case,¹ a witness was designed brother-german to William Irvine of Bonshaw, when he was only brother-in-law; and the deed was reduced.

Where the designation is imperfect, the validity of the deed will be matter for consideration, according to the circumstances of each case. The decisions seem hardly to be uniform in carrying out the rule of distinguishing the parties from all others. Thus the designation 'Robert Rollo, indweller in Edinburgh,' has been found sufficient.² The designation 'Edward Dudgeon, Gentleman,' inserted in a deed subscribed in Dublin, was sustained, upon a certificate from the Recorder of Dublin, and a residenter in that city, both Justices of the Peace, bearing that in Ireland, where the designation was written, persons of fashion, betwixt the degree of merchants or tradesmen and that of knight, go under the designation of 'Esquire' or 'Gentleman.'³ And the designation 'Doctor of Medicine,' without mention of the place of residence or any other mark of identity, has been sustained.⁴ On the other hand, the mere addition of 'Esquire,' occurring apparently in a deed signed in Scotland, was thought insufficient;⁵ and, where the deed was a bond for a sum of money, the designation 'Gilbert Elliot, inserter of the sum,' was found insufficient.⁶ This was obviously a necessary result. The case is one of answering in a circle. The question is—Who is witness to the subscription of the bond? The answer must be given from the deed itself, no condescendence being allowable to supply it; and the deed answers, 'the inserter of the sum.' Then it is asked—Who inserted the sum? The answer, in order to be effectual, must again be given from the deed, and all that the deed says is, that the subscribing witness inserted the sum, which leaves the inquirer just where he began.

We have already seen that it is not indispensable for the witnesses to add the word 'witness' to their subscriptions, at least when they are described as witnesses in the testing clause. On the other hand, it is not absolutely necessary that they shall be described as witnesses in the testing clause, when they add the word 'witness' to their subscriptions.⁷ But not only is the deviation from a rule so general, as that which correctly so describes them, objectionable in practice, but the careful adherence to the rule is greatly conducive to security, and the rule should not be departed from.

The next particular is the designation of the writer of the deed. This solemnity was introduced by the Act 1593, cap. 179, which requires the deed to make special mention, before the inserting of the witnesses,

DESIGNATION
OF WRITER OF
DEED.

¹ Graham's Creditors, 26th Dec. 1752, M. 16,902.

² Grant, 29th Nov. 1698, M. 16,913.

³ Murray, 22d July 1712, M. 16,921.

⁴ Innes, 12th Feb. 1800, Hume 911.

⁵ Hepburn, 6th Dec. 1736, Elch. voce Witness, No. 6.

⁶ Haldane, 9th Nov. 1714, M. 16,924, affirmed 15th March 1731, Craigie & Stewart's App. i. 51.

⁷ Doig and Wemyss, both quoted in p. 53, Note ¹.

of the name, surname, and particular remaining or dwelling-place, diocese, and other denomination of the writer of the body of the writ, under pain of nullity; and the Act 1681, cap. 5, repeats the nullity, declaring all writs wherein the writer is not designed to be null. Further, the Act 1681 says, this defect is not suppliable by condescending upon the writer. Neither is it suppliable by the granter's admission of his subscription.¹ The insufficient designation of the writer, who was also one of the witnesses to a deed (but who was not designed in his character of witness any more than in that of writer), was held by the Court unanimously to be fatal to the validity of a deed.² It is, of course, equally fatal if the deed names the writer incorrectly.³ But if the deed sufficiently shows who was the writer, and designs such party correctly, it has been found not necessary that the deed shall expressly bear that it was 'written' by the party so indicated and designed.⁴ The rule, as to the mode of designing the writer, may be held to be the same as that already stated regarding the designation of the witnesses. The Act of 1593, regarding the designation of the writer, is more special than that of 1579 regarding that of the witnesses; but the Act of 1681 deals with both alike, in fact in the same sentence. The proper course is to design the writer so as to distinguish him from all others; but his name and designation may be gathered from the general contents of the deed, and there may be enough *in gremio* of the deed to satisfy the requirements of the Act of 1681, as to the name and designation of the writer. The deed in Laurie's case⁵ was sustained also on the separate ground of being holograph, and therefore privileged, as we shall afterwards see. In other cases the Court have gone very far in the way of accepting meagre and questionable designations of the writers of deeds. The simple designation of 'Notary' has been found enough;⁶ also that of 'Writer';⁷ and a contract has been sustained which began with specifying the place and date of execution, thus: 'At Leckie, the tenth day of March 1708,' etc., etc., and concluded thus: 'Before these witnesses, the said Thomas Jamieson, "writer hereof"' (who, however, had not been before named), 'and Alexander Jamieson, at Leckie, day, month, and year of God foresaid.' The words 'at Leckie' in the testing clause were held as stating, what was proved to be the fact, that the writer and witnesses resided at Leckie; and thus as satisfying the statutory requirements regarding the designations of the writer and witnesses.⁸ These cases, however, and some others I am necessarily mentioning, are to be regarded as warnings against want of care in practice. It is easy in constructing deeds to place them beyond question on such points.

¹ Crichton, 12th Jan. 1802, M. 15,952; and M'Farlane, 22d May 1790, M. 17,057.

² Callander, 17th Dec. 1863, 2 Macph. 291.

³ Irvine, 11th Feb. 1710, M. 12,284.

⁴ Johnston, 16th June 1865, 3 Macph. 954.

⁵ Laurie, 14th Jan. 1859, 21 D. 240; Dickson, 22d Dec. 1710, M. 16,918.

⁶ M'Micken, 27th June 1706, M. 16,916.

⁷ Rules, 20th Feb. 1712, M. 16,920.

⁸ Jamieson, 14th December 1708, M. 16,916.

It is proper also to notice here the case of Scott,¹ in which the Court refused *de plano* to hold as null a disposition wherein the writer was designed 'John Scott, Clerk to the Signet,' in place of 'John Scott, Clerk to Cornelius Elliot, Writer to the Signet.' This last was admittedly the correct designation, and the writer of the deed was therefore incorrectly designed. But the question was not brought before the Court in an action of reduction of the disposition, as not framed in accordance with the Acts. It arose upon a summary petition and complaint to the Court against the decision of a court of the freeholders of the county of Roxburgh. The freeholders had sustained a claim of enrolment, founded in part on the disposition, because, *ex facie* of the deed, there was no irregularity; and the Court confirmed their decision. Had the question of the validity of the disposition been tried in the Court of Session in an action of reduction, there can be no doubt that the disposition would have been found null, as not containing the designation of the writer, and so not authenticated as required by law.

It is not necessary that the name and designation of the writer shall be inserted before those of the witnesses. A deed was held valid when the writer's name and designation were inserted thus: 'Before these witnesses, John Buchanan, maltman in Dumbarton, and Adam Colquhoun, servitor to James Duncanson at Garshake, writer hereof.' The objection was, that this description left it doubtful whether Colquhoun or Duncanson wrote the deed; as the mere words of the description certainly did. But it was replied, that the deed itself showed, *comparations literarum*, that Colquhoun was the writer, which was held sufficient.² The Court have even gone so far as to support deeds where the writer of the deed, though designed in the testing clause as a witness, was not referred to in the deed or testing clause as writer of the deed. This essential solemnity, therefore, was apparently not complied with. But in these cases the writer was one of the subscribing witnesses; he was designed as such in the deed, and he adjoined to his subscription as witness the words 'and writer hereof,' which was held to meet the requirements of the Statutes.³ In Macpherson's case the writer, when subscribing as witness, had not added that he was the writer. The addition to his subscription as witness of the words 'and writer hereof' was not made till after the deed was in process, the record closed, and the omission alluded to in an interlocutor, though not made the subject of judgment;—but the deed was with hesitation sustained.

It is usual in correct practice for the writer of the deed himself to insert his own name and designation, but this is not essential.⁴ It is also usual and right in deeds wholly in manuscript, besides mentioning the name and designation of the writer of the deed, to mention the name and designation of the writer of the testing clause, or any part of it, if the writer

¹ Scott, 17th Jan. 1781, M. 8,838.

² Dronnan, 26th July 1716, M. 16,869; Macpherson, 7th Feb. 1855, 17 D. 357.

³ Ewing, 20th July 1739, M. 1352.

⁴ White, 21st Feb. 1710, M. 16,864.

of the deed has not written the testing clause also; and by the Titles to Land Acts¹ it is a statutory requisite as to deeds, writs, and instruments, partly written, partly printed or engraved, and having a testing clause, to mention the name and designation of the writer, not only of the written portions of the body of the deed, etc., but of the written portions of the testing clause. But, if the writer of the body of the manuscript deed be duly named and designed, it is not necessary under the Statute to insert the designation of the person who fills up the testing clause.²

DEEDS PARTLY
PRINTED OR
ENGRAVED.

All deeds, writs, and instruments having a testing clause may be partly written, partly printed or engraved.³ In an early case, where a deed was partly written and partly printed, it was pleaded that the testing clause should name and design the printer of what was not written; but, there being no statutory requirement to that effect, it was found enough if the writer of the parts or spaces not printed were duly named and designed.⁴ We are now familiar with deeds partly written, partly printed or engraved, such as policies of assurance, and debentures and mortgages of public companies. Such deeds by Scotch Companies ought to be authenticated in accordance with the provisions of the Titles Acts of 1858 and 1860.

SPECIFICATION
OF NUMBER OF
PAGES, IN TEST-
ING CLAUSE.

The next particular is the specification, in the testing clause, of the number of the pages of which the deed consists.

In all deeds written bookwise, it is usual and proper to mention the number of the pages, if there are more than one; but, in cases where the deed consists of only one sheet, the Act 1696, cap. 15, giving parties the option of writing deeds bookwise, does not apply; and in such cases it is not essential that the number of pages be mentioned.⁵

But, although accurate compliance with the provisions of the Statute is essential in cases to which it applies, mere clerical blunders have been disregarded, where there was no suspicion attached to the deed. Thus a deed consisting of only ten pages has been sustained, though it bore to be written 'on this and the ten preceding pages.'⁶ In a deed consisting of seven pages, with a marginal addition on the sixth page, the testing clause bore that the deed consisted of 'this and the six preceding pages,' the letter 'x' of the word 'six' being written on erasure. The deed was, however, sustained.⁷ The like decision was pronounced where the letters 've' of the word 'twelve' were written on erasure.⁸ In these cases it was considered that there was enough to satisfy substantially the requirement of the Act, independently of the letters written on erasure.

¹ 21 & 22 Vict. c. 76, s. 34; and 23 & 24 Vict. c. 143, s. 20.

² Lord Corehouse in *Andrews*, 2d March 1836, 14 Sh. 589. See also *Lindsay*, 27th Feb. 1844, 6 D. 771.

³ Titles Acts, before referred to.

⁴ *Stirling*, 1st Dec. 1711, 4 Br. Sup. 856, and (same case, under the name of) *Cre-*

ditors of Spot competing, 30th Nov. 1711, M. 16,868.

⁶ *Robertson*, 7th Jan. 1742, M. 16,955; *Macdonald*, 14th Feb. 1778, M. 16,956.

⁷ *Smith*, 28th June 1850, 12 D. 1132.

⁸ *Cassillis' Trustees*, 2d June 1831, 9 Sh. 663.

⁹ *Gaywood*, 19th June 1828, 6 Sh. 991.

A more difficult question arose in the earlier case of Henderson,¹ where the testing clause bore that 'I have, to the eleven first sides of 'this my Procuratory of Resignation, contained in three sheets of paper, set 'my hand, and to the last side thereof my hand and seal.' The report is abridged thus in Morison's Dictionary,—'The objection to a deed, that it 'did not mention the number of pages, repelled; because it bore that it 'was written on three sheets of paper, and that the eleven first sides 'were signed by the granter, and the last by the granter and witnesses.' This case had various elements in it, the party having executed several deeds of settlement. Ultimately it was found by the House of Lords, reversing the judgment of the Court of Session, that the deed, with the testing clause above quoted, was the governing settlement, which they could not have held if the deed had not been considered duly authenticated according to law. It does not appear that the opinion of the Court of Session was different from that of the House of Lords on this particular point; but still the case was not purely on the Statutes, and it can give no authority for departing from the general rule. There is another case to which a similar caution applies.² A contract of marriage, written upon several sheets of stamped paper, which did not mention the number of the pages in the testing clause, was sustained; the report stating three reasons,—'*first*, because it was 'a marriage contract, and therefore more favourable than another deed; '*secondly*, because the pages were numbered; and, '*lastly*, there was a 'catchword at the bottom of each page, so that it was impossible any- 'thing could be foisted in.' Upon this case I will just remark, that a contract of marriage, upon which marriage has followed, has always been justly regarded as entitled to special favour. Such a deed may be sustained, where probably no other deed would.

A doubt was at one time suggested whether the Act of 1696, cap. 15, was intended to convey the sanction of nullity to the omission to specify in any case the number of the pages of which a deed consists; and, in support of the view that such sanction was not contemplated, it has been urged that the Act does not expressly annex the sanction of nullity to the non-observance of its conditions. But it is to be observed that the Act of 1696 is a permissive Act, granting to parties making private deeds, which consist of two or more sheets, the privilege or option of writing such deeds bookwise in place of in rolls as formerly. But such privilege or option is entirely dependent on the Statute, which requires, as conditions to be observed in the exercise of the privilege, the specification of the number of the pages of which such deed consists, the signing of each page by the party, and the marking of the pages by their numbers, all as already explained. Whilst these conditions were all in force, the non-observance of them, or of any one of them, rendered it impossible to found upon the Act in support of

¹ Henderson, 31st Jan. 1797, M. 15,444 & 17,059.

² Porteous, 4th Feb. 1757, 5 Br. Sup. 855.

the deed. Deeds, therefore, which did not comply with the conditions of the Act, were not entitled to the benefit of the Act, and were null. This was conclusively settled in the case of Thomson.¹ That case related to the omission to mark the pages of a deed, by the numbers *first, second*, etc., at the top; the provision as to which then stood on precisely the same footing with that regarding the mention of the total number of pages in the testing clause; and it was decided that the deed in question was not executed in the manner provided by the Statute, and, therefore, was not authenticated and probative by the Law of Scotland.

In a recent case,² where a deed was written on the face, or one side, of five sheets of paper, the testing clause bore that the deed was written on 'this and the four preceding skins' of parchment. This deed was thought by Lord Cowan, Ordinary, to be defective under the Statute; one side of each sheet being blank; but that point did not require to be settled by the Court.

PAGINATION.

The Act of 1856³ has, as already mentioned, done away with the marking of pages by their numbers as a solemnity; but specially without affecting the provision in the Act of 1696 as to mentioning, in the testing clause, the number of the pages of which the deed consists, or the provision for signing each page, or any other provision of the Act of 1696. The Act of 1856 having a retrospective operation, the objection of imperfect marking of the pages, or no marking at all, cannot hereafter be raised in any case. But, although it was clearly expedient to take away the sanction of nullity attached to the omission to mark the pages, such marking is convenient in all cases for reference, as we find paging useful in an ordinary paper or book. It is specially important when there is a marginal addition, or other peculiarity, to notice; and marking of the pages has been found of essential service in some of the cases arising under the Act of 1696, as to mentioning the number of the pages in the testing clause. I therefore strongly recommend the continuance of the old practice in the completion of deeds.

PLACE OF
SIGNING.

It is usual and expedient, but not necessary in point of solemnity, to mention the place at which a deed is subscribed. Stair states the mention of the place as one of the essentials.⁴ Erskine, on the other hand, whilst admitting that the insertion of the time and place of subscribing may in many cases be a strong guard against forgery, says,⁵ 'as solemnities are not to be multiplied without a warrant from Statute or universal custom, deeds have been adjudged valid without the mention of the place.'⁶ But, in compliance with universal custom, every regular deed ought to specify the place of signing.

¹ Thomson, 1st Feb. 1856, 18 D. 470, affirmed 24th March 1859, 31 *Jurist*, 425.

² Hopetoun, 6th March 1856, 18 D. 739.

³ 19 & 20 Vict. c. 89.

⁴ Stair, iv. 42. 19. ⁵ Ersk. iii. 2. 18.

⁶ See Vallance, 14th July 1709, M.

5840 & 5841, where the deed wanted the place of signing; Ogilvie, 21st July 1711, M. 16,896, and Wemyss, formerly cited, 5th June 1821, 1 Sh. 47, affirmed, 1 Wil. & Sh. 140, where both place and date were wanting.

In contracts of somewhat old date, it was usual to insert the place and date at the commencement of the deed. Now, these particulars are almost invariably stated in the testing clause.

The date of subscription likewise is, by universal custom, specified in deeds; and, as the want of it may throw suspicion on the deed, it ought in no case to be omitted; but, except where the validity of the particular deed is dependent on the specification of the date, it is not among the essential solemnities.¹ The date may be of essential importance, where the legal plea of deathbed is brought forward in objection to a *mortis causâ* disposition of heritage; or in other cases; where, for example, the objection is, that the granter was in minority when he executed the deed. These, and some other questions which the specification of the date might prevent, are suggested by the case of Crawford,² in reference to a bond wanting date.

With reference to false statement of date, Lord Stair relates a case, which is not without its parallel in more modern times. He says, 'Writs may be improbative by inspection of the stamp or seal of the paper whereupon the same is written; as, if paper with such a stamp or seal was known not to be found at the time of the date the writ bears, the writ thereby is not only improbative but improven. Of this there was a memorable example, when the Earl of Haddington was President, at the advising of the articles of improbation of a very suspect writ, where yet there was not sufficient probation to annul or improve it, it fell instantly in the President's mind to look to the stamp of the paper, and it was found that there was none such at the time of the date the writ did bear, whereupon, with common approbation, the writ was improven.' In cases where deeds are open to suspicion, it is usual at the present day to examine the water-mark of the paper, and see whether they can be set aside by the test so effectually applied by the Earl of Haddington.³

It is not a good legal objection to a private deed that it is dated on Sunday. This has been decided as to a bond,⁴ and as to a bill.⁵ A distinction, however, is taken between private deeds executed on Sunday, and judicial acts or civil process done on that day. The functions of civil Courts being suspended on Sunday by law, acts proceeding under their authority cannot be legally performed on that day. Diligence executed on Sunday is therefore null;⁶ but there is an exception in the instance of *meditatio fugæ* warrants, from the necessity of the case.⁷

¹ See Erskine (iii. 2. 18) correcting Stair (iv. 42. 19), by whom an opposite opinion is expressed. See also the cases of Ogilvie and Wemyss before cited.

² Crawford, 6th June 1666, M. 16,927.

³ The test is not always conclusive, as some paper-makers are in the practice of post-dating the water-mark, to this extent, that paper made in the latter portion of a

year may bear the date of the year immediately following.

⁴ Duncan, March 1684, M. 15,003.

⁵ Elliot, 20th Jan. 1844, 6 D. 411.

⁶ Oliphant, 3d Feb. 1663, M. 15,002; and Lord Mackenzie in Maitland, 13th Dec. 1861, 24 D. 198; Hume's Criminal Law, i. 392.

⁷ Kempt, 16th Jan. 1786, M. 8554; Blair, 6th July 1821, 1 Sh. 107.

CHAPTER IV.

AUTHENTICA-
TION OF ALTERA-
TIONS ON DEEDS.

I NOW proceed to consider the mode of authenticating erasures, marginal additions, and other alterations on ordinary deeds, and the effect of such alterations when not duly authenticated. The subject is practically of great importance, and it will therefore be considered at some length.

There is no statutory provision as to the manner of authenticating alterations on deeds in general. But practice, our institutional writers, and the decisions of the Courts of law, have laid down rules which form a safe guide, except, perhaps, that there is still a little want of precision in regard to the authentication of marginal additions.

Deeds which are free of vitiations and alterations are rendered probative by observance of the statutory solemnities already detailed; or, if holograph, they are probative as privileged. With regard to alterations in holograph testamentary writings, there are peculiar rules, different from those affecting deeds written by third parties, or not testamentary. In ordinary deeds where alterations occur, and the deeds are not in the exact form in which they were originally engrossed; where words have been erased, and others superinduced on the erasure; or where words have been deleted, or additions have been written on the margin; explanation is required, in order to show that the alterations were competently made, both as regards the time when, and the authority under which, they took place; otherwise, such deeds might be altered as to their subject-matter by the holders, after delivery had taken place; and the granters would be exposed to the fraudulent manufacture in their names of what they never consented to. Illustrations of the facility with which this might be done will readily suggest themselves. For example, the conveyance of a farm, 'excepting two fields,' might, after being delivered and in the hands of the disponee, have the word 'excepting' altered to 'including;' or the word 'not' might be introduced in, or delete from, a clause, to the subversion of the true purpose of the granter.

In order to protect parties against such risks, the common law requires in every case of alteration in the body of a deed (not being a holograph testamentary writing), proof, of a special nature, that the same was made before the deed was executed. If competent proof be given

that the fact was so, and that the alteration was actually made before the deed was subscribed, then the alteration is the act of the maker of the deed, timeously done; the alteration is probative, as part of the deed, equally with the remainder of the deed. In fact, it is the deed as altered which is his deed. But the burden of the proof lies on the holder of the deed; and, if the alteration may have been made after the execution of the deed, the presumption of law is that it was so made.¹ Where there is an alteration, therefore, the holder of the deed (not being a holograph testamentary writing) has to establish that the alteration was made before subscription; and the principles of law, applicable to alterations of every kind, are the same, requiring that all alike should be authenticated as made before subscription.

In what way, then, is the fact of the alteration having been so made to be proved in the case of such deeds as we are now considering? As a general rule, extrinsic evidence is inadmissible; the deed itself must afford the necessary evidence; just as a deed, in order to be probative, must in itself contain all the particulars by law required for that purpose. The particular mode of authentication necessarily varies in some details, according to the nature of the alteration.

I consider, first, the case of erasures, deletions, or interlineations. When these occur, the deed must expressly adopt or acknowledge the words or letters as having been superinduced on erasures, or delete, or interlined, as the case may be, before subscription; and the words or letters ought to be pointed out by quotation, and by the description of their position in the deed, in such a way as to prevent all doubt as to what words or letters are meant. This is generally done in a sufficient manner by specifying (after quotation) the page and the line of the page in which they occur; but sometimes greater precision is required, as when the same word occurs twice in the same line, once on erasure or delete, and once not.

ERASURES, DE-
LETIONS, OR IN-
TERLINEATIONS.

It is hardly safe, especially in the case of deletions, merely to mention the number of the words expunged; because it is easy to draw the pen through other words, and then the question would arise, to what words did the declaration in the deed relate? The particular words should be quoted, or otherwise identified, in every case.

The declaration or statement pointing out the words on erasure, or as the case may be, must in itself be probative, otherwise it will go for nothing. It is usually introduced in the testing clause of the deed, but it may be placed on the margin, or the requisite proof may be afforded by a reference in the deed to a duplicate thereof. There are, perhaps, other ways in which this may be effected; but, in their result, all of them must establish that the alterations were actually made before the deed was subscribed.

Notice of an alteration inserted in the testing clause, in a careful and

¹ Balfour's Practicks, p. 368; Stair, iv. 42. 19; Erskine, iii. 2. 20; Lord Colonsay, in Boswell, 31st Jan. 1852, 14 D. 378; Ross, i. 144; Menzies, p. 127.

proper manner, will be sufficient. But a caution on this subject is necessary. The existence of the alteration of itself attracts attention, or may even excite suspicion; and the alteration must not only be specified distinctly, but this ought to be done in such a way as to obviate or remove suspicion. For this purpose, the testing clause ought to be written so far as to specify the erasures or deletions before the deed is subscribed; and in so writing the clause, care should be taken to avoid crowding of words or letters, or the use of different inks, or anything to lead to the erroneous inference that the correction was not timeously made. The full completion of the testing clause ought to take place immediately after the deed is subscribed. A deletion can be authenticated by means of a marginal note bearing that the particular words were struck out of consent. This course was suggested by Lord Stair, and effect was allowed to a deletion, so authenticated, in a gift under the Great Seal. On the margin of the gift, opposite to a deletion, there was a note by the Keeper of the Seal, to the effect that the deletion was made by order of the Lord Chancellor, and of consent of the party.¹

**SIMULTANEOUS
EXECUTION OF
DUPLICATES.**

The simultaneous execution of duplicate deeds, with mutual references to each other, contained in the respective duplicates, was held sufficient to authenticate erasures, not specially noticed in the duplicate in which these erasures respectively occurred.² The erasures in the Strathmore case, though not *in essentialibus*, were very numerous. The Court here, however, and also the House of Lords, in supporting the deeds, went both on the ground that the erasures were not in themselves material, and that the duplicate deeds mutually proved the terms in which they respectively stood at the time of their execution. The opinions delivered by the Judges here, and by the Lord Chancellor and Lord Brougham, when deciding this case, are very instructive as to the principles on which alterations are to be regarded as probative or not. The Lord Chancellor, referring to the special circumstances of the case, says, 'Wherever there is an alteration, which might have operated against 'the deed if it had stood by itself' (that is, if there had been no duplicate), 'the other instrument' (that is, the duplicate) 'contains the word, 'not upon an erasure, and proves, therefore, that the deed in which the 'erasures are found was the same in form at the time the party executed it.

There are thus various modes in which alterations can be made probative. But, although the proof required was furnished in the Strathmore case in part by means of a duplicate, we are not to understand that such proof can be supplied separately from the deed in which the erasure occurs. The duplicate deeds, which were simultaneously executed, mutually referred to each other, so as to be intrinsically united, and the result was to prove (as must always be done) unequivocally, and

¹ Cumming, 4th Feb. 1709, M. 11,542.

449; affirmed 30th July 1840, 1 Robin-

² Strathmore, 1st Feb. 1837, 15 Sh. son, 189.

beyond doubt, that the alteration occurring in either of the duplicates was the act of the maker of the deed, and done before the deed was executed.

An important question, as to what is to be considered as due notice and correction, in a testing clause, of erasures occurring in the body of the deed, was decided in the House of Lords at the same time with the Strathmore case.¹ A disposition and settlement, by James Kedder, bore to be in favour of 'John Kedder, residing at Kirkhall, my son;' but, throughout the body of the deed, being no fewer than thirteen times, the whole of the Christian name 'John,' except the initial letter, was written on erasure. The testator had another son, James Kedder, junior, and in two instances the name of the disponent stood 'John Kedder, junior,' leading to the inference (as was indeed admitted) that the deed, when originally framed, had been in favour of James Kedder, junior. In the testing clause, which appeared to have been written after the deed was subscribed, as it was much crowded, the name of the disponent was introduced thus: 'In witness whereof, these presents, etc., are subscribed by me in favour of the said John Kedder, my son,' etc. In this instance, and in this only, the Christian name of John Kedder, the disponent, was free of erasure; but the erasures occurring in the deed were not in any way noticed or referred to. It was the opinion of the Court that the above testing clause could not, in reasonable construction, be held as a notice of the erasures, and a correction of them. It was held that a disponent could not effectually turn a deed written in favour of James into a deed in favour of John, by erasing the one name and substituting the other, unless the erasures were duly noticed and corrected in the deed or testing clause.

It is fatal to a deed that one of the two witnesses shall subscribe upon an erasure. The subscription so written goes for nothing, and the deed, having only one witness, is null.² To correct such a vitiation, should it ever occur, the witness should be got at once to repeat his subscription, at a place where there is no erasure; or the deed should be re-executed. When alterations in a testing clause are necessary,—for example, when one of the witnesses is incorrectly named or designed,—it is generally accounted safe, if the deed has not been recorded or exhibited judicially, to make an addition to the testing clause, containing, without vitiation, the correct name and designation of the witness. The statutory requisites are thus complied with, and the deed stands independent of the error in originally naming or designing the witness. Several cases in support of this view will be cited when we are considering the terms of the testing clause in deeds in general.

It is not competent to prove, by the writer and witnesses, that the

¹ Reid, 24th June 1834, 12 Sh. 781, and 6th March 1835, 13 Sh. 619; affirmed 30th July 1840, 1 Robinson, 183.

² Gibson, 16th June 1809, F.C., affirmed 20th April 1814, 2 Dow, 270.

alterations were made before, or at the time of, subscription; nor that they were the immediate result of the directions of the maker of the deed. This was attempted in Reid's case, and Lord Corehouse, Ordinary, who seemed disposed to have sustained the deed, was in favour of allowing the proof, but the Court refused; and it is settled law that such evidence on the above point is inadmissible.¹

EFFECT OF
ALTERATIONS.

The next point we have to consider is the effect of the alterations in deeds, not being holograph testamentary writings, when unauthenticated.

When there is no room to suspect fraud, the alterations will in general be held *pro non scriptis*.

CLERICAL
ERRORS.

The correction of mere clerical errors will be of no importance; but I will not venture to define what is necessarily to fall under that description. A word which, in one deed, is quite immaterial, may be of importance in another. But there are various cases in which corrections have been held as clerical and venial, and therefore not militating against the authenticity of the deed.² If the blank or deficiency, occasioned by holding the words in the alteration *pro non scriptis*, is not of material consequence as regards the subject-matter of the deed, the deed will remain effectual notwithstanding. A case of this kind occurred where the word 'pages' was, in whole or in part, written on erasure in a testing clause. The word was not essential, and the deed was sustained.³ The general rule applicable to questions arising upon erasures in such deeds is explained by Lord Newton, Ordinary, in a Note to his Interlocutor in Morrison's case.

Cases arising upon interlineations have been settled on like principles.⁴ In Lawson's case, the surname of the raiser of an inhibition had been omitted, and was interlined in the execution, which, as at first written, contained his Christian name only. The document was inspected by the Court, who found it 'no superinduction upon another name, which would be a suspicious rasure and vitiation, but only a mere omission of the surname, which was supplied by interlining it.' If in the two cases noted the corrections had been made by erasures (unauthenticated, as the interlineations were), it is probable that the writs would have been reduced.

TESTAMENTARY
WRITINGS.

It is to be observed, however, in reference to testamentary deeds, even though not holograph, that deletions and alterations made by the granters themselves, whom of course there is no room to suspect of fraud, will not annul the deeds as a whole, if the testator's purpose does not appear to have been so to annul them; and if the deeds, as altered, contain a good and effectual expression of the testator's will or intention. On these principles, deletions were allowed effect, and the deeds in other respects, and so far as not altered, were sustained, in the cases of

¹ Shepherd, 24th Jan. 1844, 6 D. 464; Pittillo, 22d Nov. 1671, M. 11,536.

² See in particular, Wood, 13th Nov. 1838, 1 D. 14.

³ Morrison, 30th June 1829, 7 Sh. 810.

⁴ Lyon, 21st Dec. 1709, M. 11,544; and Lawson, 14th Dec. 1697, M. 11,541.

Kemp and Earl of Traquair.¹ And superinductions on erasure, made by the granter of a holograph testamentary, and, of course, undelivered deed, have been held valid, notwithstanding the erasure.² On the same principle, the Court expressed an opinion that a legacy of £500 was not vitiated by the word 'five,' describing the number of hundred pounds bequeathed, being written on erasure, in respect that the superinduced word was holograph of the testator, although the rest of the deed was not holograph, but was written by a third party, and the deed was regularly tested, and contained no notice of the erasure.³ The judgment in this case was reversed, but not as regards the above point. I may notice, however, that Lord Jeffrey doubted the application to this case of the rule of law in regard to alterations in holograph testamentary writings. He appeared to hold that the word superinduced by the testator in a writing by another hand, ought to be specially authenticated by the testator, and is neither authenticated by being holograph, nor by the original subscription of the document.

HOLOGRAPH
TESTAMENTARY
WRITINGS.

Again, it was decided in the House of Lords, in the Morgan succession case,⁴ that certain holograph documents, though in several places erased and obliterated, were nevertheless probative and testamentary, and contained a good and effectual expression of an intention to establish, in Dundee, an hospital to accommodate a certain number of boys. The House of Lords' report contains a facsimile of the documents, and the case can hardly be well understood without inspecting this. But, on the general effect of obliterations and deletions in testamentary holograph instruments, it was observed, that 'between what is written and what is obliterated there is this distinction, that what is written must have been intentional, while what is obliterated may have been accidental.' The question is not what the testator intended to do, but what is the meaning of that which he has actually written, and suffered to remain unobliterated. Whatever has been purposely obliterated, is undoubtedly deprived of all testamentary effect; but it may be used to show what the testator knew when he wrote it, and also what was his will at the time, though he had since revoked it; and a strong opinion was expressed that the Court are at liberty to look at the erased words, for the purpose of seeing what the writer had at one time intended.

On this point, that is, the question of the intention to cancel (for, in regard to testamentary writings the question always is as to the intention), the law of England and that of Scotland do not materially differ, if they differ at all; and it may interest you to read the opinion of Lord Chief-Justice Mansfield in an English case, referred to by the Lord

¹ Kemp, 2d March 1802, M. 16,949; and Earl of Traquair, 26th June 1822, 1 Sh. 527.

² Robertson, 20th December 1844, 7 D. 236.

³ Grant, 27th Feb. 1849, 11 D. 860.

⁴ Magistrates of Dundee, 1st May 1858, 3 Macqueen, 134, reversing the judgment of the Court of Session, 26th June 1857, 19 D. 918.

Chancellor in delivering judgment in the Morgan case. Lord Mansfield says, 'If a man were to throw the ink upon his will, instead of the sand, though it might be a complete defacing of the instrument, it would be no cancelling; or suppose a man having two wills, of different dates, by him, should direct the former to be cancelled, and, through mistake, the person should cancel the latter, such an act would be no revocation of the last will; or suppose a man, having a will consisting of two parts, throws one unintentionally into the fire, where it is burnt, it would be no revocation of the devises contained in such part. It is the intention, therefore, that must govern.' And Dr. Lushington says, 'Burning or tearing a will, without intention, could not revoke the instrument, or any part.'

But holograph writings have no exceptional privileges as regards erasures or other vitiations made, or which may have been made, after they are delivered. Upon delivery, such deeds, as regards that matter, are on precisely the same footing with ordinary deeds. In holograph deeds, therefore, independently of any suspicion of fraud, a vitiation *in substantialibus*, if made after delivery has taken place, or may have taken place, will be fatal to the deed; or will render the clause, or part in which it occurs, inoperative, according to the circumstances of each case.

Thus, in Reid's case, where the Christian name of the donee was written on erasure throughout the body of the deed, and only once free of erasure in the testing clause, the deed was reduced. The erasure was in that case *in essentialibus*. On the same principle, when the designation or description of the first substitute under an entail was written on erasure wherever it occurred throughout the deed of entail, the deed was reduced as vitiated *in substantialibus*.¹ In Boswell's case,² a deed of entail prohibited the heirs from selling or disposing the estate, either irredeemably or under reversion. The portion 'irred' of the word 'irredeemably' was written on erasure. Without these letters the word was not a negative; and it was held that there was no prohibition against an irredeemable sale or alienation. And when the words 'not be lawful,' in the prohibition to alter the order of succession under an entail, were written on erasure, the entail was held as containing no prohibition on that essential point, and so inoperative.³ Partial erasures or deletions, however, even though in words or clauses which, to certain effects, are *inter essentialia*, do not necessarily vitiate or annul the whole deed, if no fraud is alleged. The entails in Boswell's and Fraser's cases were good as conveyances of the estates, and in all other respects, except as regarded the clauses affected by the vitiations. A precept of sasine, falsified in the name of one parcel of lands, *sine fraude aut culpa* of the party, was sustained as to the other lands, and reduced only as to the

¹ Shepherd, 24th Jan. 1844, 6 D. 464, affirmed 21st July 1847, 6 Bell's App. 153.

² Boswell, 31st January 1852, 14 D. 378.

³ Fraser, 11th March 1854, 16 D. 863.

particular lands erased.¹ And where the whole of a precept of sasine was written on erasure, and the erasure unauthenticated, the Court refused to reduce more than the erased clause.² Again, fraud not being alleged, a Crown charter, in which an important word was written on erasure, was similarly dealt with, the Court refusing to reduce the same *in toto*, and only holding the word written on erasure *pro non scripto*.³

But if fraud is an element of the case the result will be different. **FRAUD.** Where the grantee altered the date of a *mortis causa* deed after the testator's death, the Court held the vitiation in the date an insuperable objection, and reduced the deed; although, with its original date, it would apparently have been sustained. The Lord President Campbell said, 'A partial manufacture in the date must have been for a fraudulent purpose.' He held the deed as having been executed at the last moment of life, when apparently the granter had not capacity to execute any deed.⁴

Fraud will be presumed where the vitiation is in an essential clause or part of the writ, and also in the case of the deletion in an ordinary deed where the words deleted cannot be read. I have recommended that, in authenticating deletions, the words delete should be quoted; and in that case certainly the deletion should be made in such a manner that the words can be read, in order that they may support the quotation. The deletion, if it could not be read, would, in such case especially, suggest suspicion of fraud.

But deletion, in any case, is apt to create suspicion, or at least to call **SUSPICION.** for explanation. In the cases of Cuming, the Earl of Traquair, and Kemp, the words delete could be read, and they were thus seen to be not *in substantialibus* with reference to the deeds as a whole. On the other hand, a bond was reduced, in which, in a material part connected with the term of payment, there was about half a line obliterated, so that it could not be read. Consequently it was presumed that it might be a clause that would evacuate the bond, and had been delete on that account by the holder.⁵

We have also a case of vitiation of a disposition by deletion of two lines, immediately following the description of lands, so completely that it was impossible to discover what had been written upon them. Lord Mackenzie, Ordinary, said, 'The deletion had not the least appearance of anything else, but being intentionally done to get rid of the true description of the subjects disposed.'⁶ Such a case as this strongly illustrates the value of the rules of law in force as to the authentication of alterations. But it is not necessary to establish fraud, in order to the reduction of a deed which is vitiated, even where the words delete are left legible, if they are *inter essentialia*. It was so decided in a case⁷ where a disposition was reduced, apparently at the instance of a creditor of the granter, because two lines, expressing the onerous cause

¹ Keir, Feb. 1597, M. 17,062.

² Peddie, 12th June 1857, 19 D. 820.

³ Adam, 12th June 1810, F. C.

⁴ Merry, 6th Feb. 1801, M. App. Writ

No. 3; affirmed 17th March 1806, 5 Paton 101.

⁵ Pittillo, 22d Nov. 1671, M. 11,536.

⁶ Grant, 12th May 1830, 8 Sh. 734.

⁷ Brown, 20th June 1701, M. 11,541.

ALTERATIONS in
substantialibus.

of granting, were wholly delete. Again, in another case,¹ the alteration of the letter 'i' into 'y,' in the subscriptions of an affidavit and relative mandate, were held as showing that the subscriptions had been tampered with; and the writings were held improbable.

MARGINAL
ADDITIONS.

The rules of law applicable to the authentication of marginal additions are the same as those connected with alterations made by erasures or otherwise. The usual manner of authenticating a marginal addition as part of a deed, is to connect it with the body of the deed by the mark called a 'caret,' or by a × inserted, so as readily to catch the eye, at the place where the addition is to be introduced, in reading the deed,—a distinct mark, of precisely the same description, being made at the commencement of the addition written on the margin. The addition is then signed along with each page of the deed, the party writing his Christian name on the one side and his surname on the other side of the addition. The testing clause, in such cases, mentions that the deed consists of so many pages, with a marginal addition on such a page, all written by A. B., etc. The clause, being completed in usual form, thus names and designs the writer of the marginal addition, as well as of the body of the deed, and mentions that the addition, as well as each page of the deed, is signed by the grantor in presence of the witnesses; all which being regularly done, the marginal addition is made part of, and is equally probative with the rest of, the deed. Where the addition is in a different hand, it is equally necessary to design the writer thereof as the writer of the body of the deed.

The instrumentary witnesses must be mentioned as witnesses to the signing of the marginal addition, as well as of the body of the deed;² and, when notaries act for the party, I have advised that the warrant to them should apply not merely to the deed generally, but likewise to the marginal addition expressly.

It is not to be understood, however, that there is any exclusive mode, or set of modes, in which marginal additions are to be authenticated. In the case of Bruce,³ the Court of Session sustained a marginal addition, not fully authenticated, on the ground of homologation. The House of Lords, in affirming the Court's decision, struck out that special ground, and found generally that 'matter has been alleged sufficient to answer 'the objection to a conveyance of lands, contained or described in marginal additions only, that such marginal additions were not tested in 'terms of the Act 1681.'

I must also notice here two reported cases, in which, at first sight at least, it does appear that effect has been allowed to marginal additions, not authenticated further than by the signatures of the granters of the deeds.⁴ But a careful examination of Cuming's case will show that it

¹ Murray, 15th Nov. 1856, 19 D. 44.

² Broomfield, 7th Dec. 1752, M. 16,817.

³ Bruce, 6th Dec. 1770, M. 10,805; affirmed 7th April 1772, 2 Paton, 258.

⁴ Cuming, 18th April 1721, Robertson's App. 364, and Spottiswood, 17th June 1741, M. 16,811, and 5 Br. Sup. 709. See also 1 Craigie & Stewart, 284.

does not necessarily support the doctrine that marginal additions can be authenticated by the mere signature of the party. In Spottiswood's case, the marginal addition occurred in a bond, and was in the same handwriting with the bond. The addition contained a qualification in favour of the granter and against the grantee. The grantee was custodier, and there was thus, the report says, no suspicion of the addition having been unduly adjected, unless it could be proven that the bond had fallen into the hands of the granter. The grantee, moreover, had, in certain judicial proceedings, pleaded on the bond in such a way as to allow effect to the marginal addition. He had judicially admitted it. This appears equivalent to adoption or homologation; and it will be observed that what the Court found was only that the addition was good against the user (the party in right of the grantee or custodier) of the deed. The ground of the decision may thus have been adoption or homologation. In these circumstances, though the two last-mentioned cases are certainly of an unsatisfactory tendency, I do not admit them as authorities for holding that a marginal addition upon a deed can be authenticated, without being formally adopted as part of the deed; and there can be no doubt that the practice of authenticating such additions, in the way I have stated, is universal.

The non-authentication of marginal additions does not necessarily invalidate the whole deed.¹ As a general rule, the additions will be held *pro non scriptis*, and the result of their non-authentication will depend on the nature of the deed, and the subject-matter of the addition. But marginal additions, once made and duly authenticated, are parts of the deed, and are not to be delete or altered, any more than if they had been in the body of the deed. Thus, a bond, on the margin of which it was alleged that a material addition had been written, having been mutilated by cutting off the margin, was reduced *in toto*.²

The question of the best or most satisfactory mode of authenticating marginal additions is one of much interest in Conveyancing. Lord Stair³ observes that such additions are more easily suspect than what are in the body of the writ, except where the writ is mutual, and the marginal additions are signed by both parties; adding, as his reason, 'for it is not certain that the witnesses subscribed when these additions were made.' This passage has apparently suggested the security recommended by Mr. Duff,⁴ that marginal additions should be signed by the witnesses as well as by the party. But if care is taken to frame the testing clause so as to prove that the witnesses attest the subscription of the marginal addition, as well as of the body of the deed, there seems no ground for adopting this course, which is quite unknown in present practice. Mr. Duff further suggests, that marginal additions should be noticed by the number of the page and of the line at which they occur;

WHAT IS THE
BEST MODE OF
AUTHENTICAT-
ING MARGINAL
ADDITIONS?

¹ Johnston, Feb. 1688, M. 17,063; Carnegie, 16th Jan. 1695, 4 Br. Sup. 242.

² Stair, iv. 42. 19.

³ Cunninghamhead, 26th June 1628, M. 12,274.

⁴ Duff's *Feudal Conveyancing*, p. 22.

and Professor Menzies, in reference to marginal additions of great importance, gives similar advice.¹ In such cases that course may be very expedient; but, though I think our practice is not altogether satisfactory on this point, I apprehend it is on the whole uniform, and I have not heard of any bad result or feeling of insecurity in connexion with it. In these circumstances, I do not see any cause to go beyond Professor Menzies' recommendation.

Before leaving this subject, I would recommend that where alterations, which will always be more or less matter of necessity, are of an important nature, or are numerous, though comparatively unimportant, it is best to write over the deed, should time permit. If that cannot be done, resort to marginal additions, whenever they are suitable, in preference to erasure. By every means avoid erasures.

¹ Menzies, p. 127.

TITLE II.

PRIVILEGED WRITINGS.

CHAPTER I.

HAVING now explained the solemnities applicable to the authentication of deeds in general, we have to notice the classes of deeds which, as regards the mode of authentication, are privileged, and to consider the manner in which privileged writings require to be executed, in order to be probative. They are called privileged, because they have the support of the law, though destitute of some, or even of most, of the solemnities essential in ordinary cases.

We shall consider, *first*, Holograph Writings.

HOLOGRAPH
WRITINGS.

The object of the solemnities prescribed in reference to deeds in general is, in the first place, to give security of title—protection against the fraudulent fabrication of writings; and, secondly, to prevent parties from being entrapped into transactions by making the execution of deeds a matter of solemnity, and not of mere ordinary occurrence. But, in the case of holograph writings, the statutory solemnities are not necessary for the above purposes, and the acts do not apply, because the handwriting of any party, through a whole deed, is more difficult to be imitated or counterfeited, and therefore less exposed to forgery, than the bare subscription by a party of his name; and both writing and subscribing a deed is a more trustworthy and deliberate expression of intention than merely subscribing a deed written by another.¹ It is very important, and in some cases may be essential, that holograph writings should be subscribed. Lord Stair says,² ‘Holograph writs subscribed are unquestionably the strongest probation by writ, and least imitable.’

It is not essential, in order to give the privilege belonging to holo-

¹ Erskine, iii. 2. 22; 1 Bell's Comm. 12,605; and anonymous case, 1 Br. Sup. 324; Menzies, 135; Dickson on Evidence, 103.
1. 397; Earl of Rothes, 9th Dec. 1635, M.

² Stair, iv. 42. 6.

graph writings, that every word of the deed shall be holograph. Lord Stair says, in the passage above cited, 'Writs are accounted holograph 'where large sentences are written with the party's hand, although not 'the whole writ;' and the term 'large sentences' has been construed as meaning the substantial parts of the deed; such, for example, as the sum and the name of the debtor in a bond. Accordingly, a bond was sustained in which the name and designation of the granter, the principal sum and penalty, and the date, were proved to be written by the granter.¹ On this principle, as has already been stated, the settlement by Mr. and Mrs. Laurie of Wellfield, spouses,—disponing the husband's heritage, and all written by the husband, except seventeen words of little moment, which were written by the wife,—was held valid as the holograph writ of the husband.² We formerly saw that the same writ was sustained as having been duly tested; but the Court intimated that they held it probative on each of two separate grounds,—one, that it was holograph of the husband; the other, that it was duly tested. On the other hand, the acknowledgment of the receipt of a sum of money in loan, though signed and addressed by the borrower, was held improbative, no other part of it being written by him, and the writing not being *in re mercatoriâ* (this last being a separate ground of privilege in authentication of deeds, as we shall presently see).³

The privilege attached to holograph writings can, in general, support them only as granted by one individual. Thus, an obligation for £80, subscribed by three individuals, and holograph of one of them, but not authenticated with the solemnities applicable to deeds in general, is not binding on the parties who merely subscribed, but had not written it.⁴ But a letter, written by the managing partner of a company, and subscribed by him with the company's firm, guaranteeing, to a certain extent, a promissory-note by one of the partners as an individual, has been held probative as against the company.⁵ And a writing, subscribed by a husband and wife, written partly by the husband on the fly-leaf of a Bible, certifying that they 'made this agreement that the longest liver was to have all that remained after their debts were paid,' was dealt with as a mutual settlement of moveable estate, and allowed effect in reference to the husband's moveables against his next of kin.⁶ The Court refused to treat this paper as an 'agreement,' though the parties had so described it; holding that persons in the humble ranks of life, as the parties in this case were, ought not to be tied down to technicalities of construction; and that the deed, though not described by them with exact accuracy, spoke for itself, as to its real nature, as being that of a mutual will, and was to be dealt with accordingly. A more difficult question would have arisen, if the effect of the document as against the wife had been tried;—she only *subscribed* it;—but that point did not properly arise.

¹ Vans, 23d Jan. 1675, M. 16,885.

² Laurie, 14th Jan. 1859, 21 D. 240.

³ Alexander, 26th Feb. 1830, 8 Sh. 602.

⁴ Miller, 29th May 1835, 13 Sh. 838.

⁵ Buchanan, 29th May 1835, 13 Sh. 841.

⁶ M'Millan, 28th Nov. 1860, 13 D. 187.

Holograph writings ought expressly to mention that they are written by the grantor; but it is not essential that they shall state the fact; it is enough, in order to their validity, if the fact be so. When they contain the statement, it will be held *prima facie* evidence of the fact,¹ and the *onus* of proving the contrary will be thrown upon the challenger.² But, if the fact is not stated in the writ, the *onus* of proof that it was written by the grantor appears to lie on the party founding on the writ.³ The mode of proof will not be confined to *comparatio literarum*. Facts and circumstances generally will be considered. In a case where a writ, alleged to be holograph, but which did not bear *in gremio* to be so, was challenged on the ground of forgery, an opinion was indicated by Lord Jeffrey, that the user of the writ discharged the *onus* laid upon him by adducing *prima facie* evidence that the body of the writ was in the same hand as the subscription, and that the *onus* of proving forgery then lay upon the challenger.⁴ But that view, if Lord Jeffrey is correctly reported, must have been expressed incautiously. On this point, I refer you to the Lord Chancellor's remarks on it, and explanation of its only legitimate meaning, in Anderson's case.

HOLOGRAPH
WRITINGS
OUGHT TO BEAR
THAT THEY ARE
HOLOGRAPH.

We have seen that, in the case of deeds in general, it is competent to raise the objection that the subscribing witnesses neither saw the party subscribe, nor heard him acknowledge his subscription. But that objection is not relevant in the case of holograph writings, even when these bear to be subscribed before witnesses, unless the date be essential to the efficacy of the deed, because such writings are valid whether the subscription was duly attested or not.⁵ Yeats' case was that of a testamentary writing applicable to heritable estate in Scotland, but there was no challenge on the head of deathbed, so as to make proof of the date essential.

Holograph writings, without witnesses, prove their own date as against the grantors, in questions where third parties are not interested;⁶ but not against third parties, as the insertion of the date is merely the grantor's statement that the writ was subscribed upon such a day. Practically this is a matter of necessity, otherwise parties might, when not controlled by witnesses, antedate writings, by which their heirs might be cut off from the plea of deathbed; creditors-inhibitors, from the benefit of legal diligence; or a husband from the defence that his wife had granted the obligation sued on after she was married; or the antedating might take place in order to affect some other right known to exist, or to be capable of existing. It has therefore been found that the date of holograph deeds must be supported *aliunde*, by adminicles, in questions with the grantor's husband;⁷ or in questions with his heir in heritage;⁸ and in various similar cases. Holograph letters, however, from

DO HOLOGRAPH
WRITINGS PROVE
THEIR OWN
DATE?

¹ Erskine, iii. 2. 22.

² Robertson, 20th Dec. 1844, 7 D. 236.

³ Anderson, 25th June 1850, 22 *Jurist*, 478; affirmed 16th April 1853, 3 Macqueen, 180.

⁴ Turnbull, 29th Feb. 1844, 6 D. 896.

⁵ Yeats, 6th July 1833, 11 Sh. 915.

⁶ Earl of Dunfermline, 14th Jan. 1674, 1 Br. Sup. 703.

⁷ Temple, 20th Jan. 1636, M. 12,490.

⁸ Calderwood, 14th Nov. 1668, M. 12,607.

the proper parties, intimating and acknowledging notice of the assignation of a debt, are allowed in proof of the intimation and of its date, even against an arrester of the debt assigned.¹ It is apparently a sufficient reason for the exception that the holograph intimation and acknowledgment lie not in the hands of the writers thereof respectively, but of the debtor and creditor in the debt assigned.

DEATHBED.

The presumption of deathbed, applicable to *mortis causa* deeds of heritage, is not admitted against a holograph deed, when the granter has died an unnatural death.² The consideration of exceptional cases, in connexion with the legal presumption of deathbed, is discussed by Sir Thomas Craig,³ who debates how far deeds granted by one going straight to fight a duel, or when the plague is raging in a town, or by one going to be cut for the stone, are reputed to be done on deathbed. To this category may be added the case of one under sentence of death for a crime. As a general rule, in the case of a holograph testamentary deed, when the question of deathbed is not involved, the date is of no importance, and it is irrelevant to allege that the deed bears a false date. Moreover, where the granter of a holograph deed, bearing a certain date, was proved to have become insane at a subsequent period, and died insane, it was found that there was no presumption that the deed was executed during insanity.⁴ It is clearly, however, advisable in practice, in regard to such holograph writs as require for any cause to have their dates proved *aliunde*,—for example, gratuitous deeds intended to affect the granter's heirs in heritage, or deeds which may be founded on in competitions among creditors,—to adopt means for preventing all question respecting the date. This can be done by recording them in the Register of Sasines, if they are conveyances of lands; intimating them, if they are assignations of debts (and this had best be done notarially in such cases); or, in any case, by recording them in a register for preservation.

HOLOGRAPH DEEDS OUGHT TO BE SUB- SCRIBED.

Holograph deeds ought to be subscribed by the party, as the best evidence of their being completed instruments. Stair says,¹ 'If they be not subscribed, they are understood to be incomplete acts from which the party hath resiled; yet if they be written in compt-books, or upon authentic writs, they are probative, and resiling is not presumed.' The test to be applied is whether the writ is complete or incomplete. A holograph testament, though wanting date and witnesses, and not subscribed, was sustained in an old case.⁶ The writing will be more readily supported if connected with a formal and regularly complete document. Thus a holograph receipt, by the creditor in a bond, for £50 to account, written on the back of the bond, but not subscribed, was sustained.⁷ Still more readily will the holograph document be

¹ Earl of Selkirk, 22d July 1708, M. 4453; as reversed 14th March 1708, Robertson's App. 1. See also the earlier case of M'Gill, 22d Jan. 1630, M. 12,605.

² Graham, 19th Jan. 1703, M. 12,614.

³ Craig, *De feudis*, lib. 1. Dieg. 12. s. 38.

⁴ Waddell, 13th May 1845, 7 D. 605; Suttie, 3d Feb. 1838, 16 Sh. 429.

⁵ Stair, iv. 42. 16.

⁶ Titill, 6th Dec. 1610, M. 16,959.

⁷ Currence, June 1688, 2 Br. Sup. 121.

sustained, if it is such a writing as is not usually subscribed. In the case of *Wauchope*,¹ it was found no objection to a promise contained in the *P.S.* to a holograph signed letter, that the *P.S.* was not subscribed. Similar decisions arising out of postscripts to letters were pronounced in the cases noted below.² Of course the letters themselves must be subscribed and complete, otherwise the *P.S.* cannot be sustained. The subscription or non-subscription, however, is of critical importance in the question whether a holograph writ is completed or not. In the case of *Dunlop*,³ a holograph writing, commencing with the name and designation of the party, and purporting to operate a general distribution of his estate, as his last will and settlement, but wanting the subscription, and bearing sundry other marks of incompleteness,—for example, two clauses naming legatees, but leaving the amount of their legacies blank,—was held invalid.

¹ *Wauchope*, 11th July 1662, M. 16,965.

1671, 2 Br. Sup. 517; 13th Feb. 1671, 2

² *Paterson*, 10th July 1717, M. 9441.

Br. Sup. 517.

Annent a postscript to a letter, 13th Feb.

³ *Dunlop*, 11th June 1839, 1 D. 912.

CHAPTER II.

TESTAMENTARY WRITINGS.

I SHALL next notice those testamentary writings which, by our common law, are in the class of privileged deeds.

Such writings have no privilege as far as they relate to heritable estate; and, as affecting moveable property, they are privileged only in two particulars, viz. :—(1.) One notary and two witnesses appear to be sufficient to execute and attest a testament on behalf of a party who cannot write, though the value of the personal estate may be such that no deed affecting the same, except a testament, could be executed without two notaries and four witnesses; and (2.) The minister of the parish where the party dwells, at the time of executing the testament, can act as notary.

There does not appear to be any decision in support of the doctrine laid down by Erskine,¹ that testamentary deeds are sustained, though not quite formal, if the testator's intention sufficiently appear. The testator's intention, as expressed in such deeds, will receive effect if the deeds are duly authenticated; but it is indispensable that they should first be so authenticated.²

VERBAL TESTAMENTS.

Nuncupative or verbal testaments are not valid, by the law of Scotland, to the effect of authorizing an executor so named to act, for which purpose there must be a probative writing.³ But a verbal legacy may be granted of a sum or article not exceeding £100 Scots in amount or value; and, if a pecuniary legacy in excess thereof be bequeathed, the legatee can recover to the extent of £100 Scots, on restricting his claim to that amount.⁴ The same rule would, no doubt, apply in the bequest of an article exceeding £100 Scots in value, if division were possible. But verbal directions to make a will, which the party means to subscribe, do not constitute a nuncupative testament; and, if the party dies before the will is executed, the directions will count for nothing.⁵

DEEDS EXECUTED INFORMALLY.

I have now to call your attention to cases in which parties have been allowed to dispense with some, and even most, of the statutory

¹ Erskine, iii. 2. 23.

² Moncrieff, 14th July 1710, M. 15,936;
affd. 15th May 1711, Robertson's Cases,
26; Rankine, 7th Feb. 1849, 11 D. 543.

³ Erskine, iii. 9. 5.

⁴ Wallace, 7th July 1629, M. 1350.

⁵ M'Farquhar, 16th June 1779, M.
3600.

solemnities, in regard to the execution of deeds. The class of cases in which such dispensation is allowed does not include deeds by which heritable estate is conveyed. It is further limited to writings over which the maker of the privileged writing, or of the deed which allows or confers the privilege, has exclusive power. The principle on which the privilege is allowed appears to be this, that although the law has introduced certain formalities of execution, in order to prevent parties from being entrapped into transactions, these formalities are not intended as a restraint upon parties who wish to dispense with them. On the contrary, such parties, as to the class of deeds and writings in question, are entitled to dispense with some or most of the statutory solemnities, and to point out in what way the deeds and writings which they themselves have privileged are to be authenticated. And it would appear that such deeds and writings, if executed in the prescribed mode, will receive effect in like manner as if they had been executed with all the statutory solemnities. It is, of course, necessary that the prescribed mode shall be duly observed. The deeds and writings have no support from Statute, and, if they do not come within the line laid down by the granter of the privilege, they cannot plead the privilege, and will be regarded as unauthenticated.

SPECIAL CASES
OF PRIVATE
PRIVILEGE.

In the class here referred to, I notice, first, the case of Gillespie.¹ A testator had executed a regular and formal deed of trust-settlement, desiring his executor 'to pay all legacies and bequests which I have already, by 'separate writings under my hand, of various dates, made and granted, 'and also all other legacies and bequests which I may at any time 'hereafter make and grant, by any separate deed of legacies or codicils, 'or by any separate writings or memorandums, although the same be 'not formally executed, provided the same express my will and intention, *and are written, dated, and signed by me.*' The testator left two holograph documents, bequeathing legacies; one consisting of a single sheet, the first page of which was dated but not signed, and the second page, bearing a subsequent date, was signed; the other document formally set forth, at the commencement, the testator's name and designation, thus:—'I, James Donaldson of Broughton Hall, leave the following additional legacies,' &c., and was dated but not signed. The Court held that the first page of the former of these documents was in law signed by the subscription attached to the second page; and that, in the other document, the testator's insertion of his own name, in the first person, and of his designation, was a sufficient compliance with the provision contained in the formal deed of settlement, that any separate deed or writing by the testator should be signed; and therefore the several legacies contained in both documents were found due. These documents were sustained, because authenticated in the way the testator had himself prescribed, and falling within the description or class of writs to

¹ Gillespie, 22d Dec. 1831, 10 Sh. 174.

which he had desired effect to be given. I have to remark, however, that in Dunlop's case,¹ Lords Cockburn, Mackenzie, and Fullerton, expressed doubt whether Gillespie's case, which was decided by a bare majority, in opposition to the opinion of Lord Corehouse, Ordinary, did not go too far in sustaining the documents.

In the same class we have the case of *Wilsone*,² where two sisters jointly executed a trust-settlement, and provided therein for the payment 'of all legacies which we may direct to be made, by letter or other writing under our respective hands, whether formal or informal.' It was here held that a writing, subsequently written and signed by one of the sisters, and also signed by the other, but not tested, was effectual to constitute a valid bequest of a legacy under the joint settlement, as being executed in due conformity with the special rules, as to the authentication of such writings, laid down in the joint-settlement. We have also a recent case,³ where an informal writing, found in the repositories, and enclosed in the same envelope with the will, of Miss Mary Young, was held a valid codicil to her will. The writing was headed 'codicil to my will,' and consisted of a catalogue of legacies drawn up much in the form of a merchant's account. It was not in the testator's handwriting, but several entries and alterations were in her handwriting, and it was signed by her and dated, and had in her handwriting above her signature, 'This is written to my dictation.' In her trust-disposition and deed of settlement, she provided for various payments, and, *inter alia*, as follows: 'And in the second place, of the several legacies or bequests which by any writing or writings under my hand, hereunto annexed, or on a paper or papers apart, I shall make and settle.' The Court held that the testator, by her trust-deed, had expressly provided that a writing of this kind was to receive effect. The evidence as to her intention that this should be treated as a codicil to her will was complete. Lord Deas pointed out that the omission, in the trust-deed, of the words 'whether formal or informal,' in reference to the contemplated writings, made no difference when there was conclusive evidence that the writing in question was such a writing as had been contemplated. I notice, lastly, under this branch, *Crosbie's case*, already cited.⁴ Here a holograph testamentary writing was sustained, without subscription, because the writer had, in a formal deed of settlement, provided that her executors were to pay such legacies as, by a writing 'under my hand, however informal, I may bequeath.'

Again, the use of the statutory solemnities can be dispensed with, as to a writing which in itself has no pretension to due execution, by adopting it, and making it part of a regular and formal testamentary deed, by words or clauses directing or sufficiently showing that the testator intends such writing to be so adopted. This appears to have been settled

¹ *Dunlop*, 11th June 1839, 1 D. 912.

² *Wilsone*, 13th December 1861, 24 D.

163.

³ *Young's Trustees*, 3d Nov. 1864, 3 Macph. 10.

⁴ *Crosbie*, 2d June 1865, 3 Macph. 870.

first by the case of *Macintyre*.¹ Here a writing of instructions to trustees, not holograph, but signed by the testator, was sustained, because in a holograph addition to it, which immediately followed the subscription, the testator appeared to adopt its contents. A decision on a similar principle was given by the House of Lords, in a case where effect was allowed to a writing in itself improbate, because it was by due and sufficient reference adopted, and made part of a probative writing.²

A more difficult question arose in the case of *Callander*.³ An heir of entail, in the exercise of power conferred by the deed of entail, signed a bond of provision in favour of trustees for his younger children. Owing to the omission to design the writer, the bond was not probative in itself. On that point the whole Court were unanimous. But the granter had made two additions to the bond, both written upon the bond, naming additional trustees 'for the purposes within written,' or 'for the purposes within mentioned,' and also tutors and curators to his children, 'with the same powers as the trustees and tutors and curators before named.' These additions were both executed in regular and formal manner. In some other testamentary writings the bond of provision was recognised as a subsisting document, and in one important particular the testator's settlements in favour of his wife were framed on the assumption that the bond was a good and valid deed. In these circumstances, the Court by a majority held that the bond was valid, though not tested according to law. The principles on which the Court sustained it were of several classes; but there was a general opinion that the bond had been made good and effectual by approbatory deeds, and in particular by its adoption and importation into other relative and connected deeds calculated to affect the heir, and which themselves were probative and binding. Another view was, that the additions to the bond virtually reiterated and extended it, by the nomination of additional parties to carry it out.

It thus appears that parties, dealing with what is within their own control, can give efficacy to writings in themselves improbate—not being conveyances of heritable estate—by means of probative deeds, or words or clauses in such deeds clearly expressing the parties' intention, and clearly indicating what is to be made effectual. But, in reference to such cases, it is necessary to take care that the probative deed shall contain a reference so clear as to exclude all doubt as to what is referred to; and, when the writing, in itself improbate, is to receive effect in consequence of words or clauses in a previously executed deed, to take care that such writing is clearly brought within the description expressed in such words or clauses. Moreover, where the writing intended to be adopted is enclosed in an envelope, the subscription of a docquet on the envelope is not sufficient to authenticate the writing enclosed. The docquet and subscription ought to be upon the writing itself; or the

¹ *Macintyre*, 1st March 1821, F. C.

² *Buchan*, 27th May 1828, 6 Sh. 864;

³ *Callander*, 17th Nov. 1863, 2 Macph. 291.

as reversed, 18th Oct. 1831, 5 Wil. & Sh. 785.

PARTIES CAN
PRESCRIBE
ADDITIONAL
SOLEMNITIES
IN CERTAIN
CASES.

identification of the writing should be accomplished in some other way, so as to be clear and indisputable.¹

On apparently a similar principle to that which allows parties to dispense (as to writings over which they have full control) with certain of the statutory forms of authentication, it has been found that a party, in reference to his own will, can prescribe additional solemnities, besides those which the law requires, in regard to the authentication of such will itself, and can make such additional solemnities essential to the validity of the will. In the case of *Nasmyth*,² a party domiciled in Scotland had executed a holograph will by signing and sealing it, the testing clause bearing that he had hereto set his hand *and seal*. This document (altered in various particulars by the granter during his lifetime, but not thereby annulled) was found in the granter's repositories at the time of his death, but without the seal. The seal had obviously been torn or cut off; and the House of Lords thought that this could only have been done by the testator himself, and held that the will had thereby been revoked or cancelled. Lord Redesdale said, 'It was mutilated by tearing off the seal, which the testator himself had declared to be one of the ceremonies which he imposed upon the instrument, for the purpose of giving it validity.' His Lordship held that the testator's tearing off the seal was equally fatal with his tearing off the subscription. If the affixing of his seal was a ceremony which the party had stated he conceived fit to be annexed to the instrument for giving it validity, by removing that ceremony he destroyed its validity, and showed his intention of revoking or cancelling it,—an intention which, when clearly shown by the will itself, will always be allowed effect.

¹ *Cleland*, 22d January 1851, 13 D. 504.

² *Nasmyth*, as reversed, 27th July 1821, 1 Sh. App. 65.

CHAPTER III.

THE next class of privileged writings to which I have to direct your attention is that of Personal Contracts, or Personal Obligations, executed by persons having their domicile in England or in a foreign country, according to the laws of their domiciles respectively. The privileges allowed to such deeds, when executed by foreigners, is extended to writings of the same class even when the grantor is a Scotchman, provided the deeds are actually executed out of Scotland, and according to the laws of the place of execution. But it is essential, as to all such deeds, that as matter of fact they *are* validly executed according to the laws of the country where they are entered into. If not so, they are wholly invalid. Lord Ellenborough says, 'A contract must be available by the law of the place where it is entered into, or it is void all the world over.'

FOREIGN
DEEDS:—
PERSONAL CON-
TRACTS BE-
TWEEN FOREIGN-
ERS EXECUTED
ACCORDING TO
LAWS OF DOMI-
CILE.

The deeds or writings in question, when executed as above stated, and when not inconsistent with our laws or rules of morals and police, are by our practice supported and capable of being enforced in Scotland, equally as if they had been executed by persons domiciled in Scotland, and in the Scotch form. In the case of Fortoun,¹ execution was allowed on a bond granted by John Shewan, burgess of Dundee, at Middleburgh, in Holland, in favour of Keysars of Middleburgh, because the bond was made in Middleburgh, according to the custom observed there between merchant and merchant. It does not appear from the report that Shewan had acquired a foreign domicile. A decision on the same principle was given in another case² in reference to a bond made in France by the Lord Saltoun and several others—described as all captains in France in the Earl of Irvine's regiment—to a Frenchman, according to the style and form of France. The same principle has been applied, although both the granters and grantees of the bond were Scotchmen; but apparently only when the granters were resident in England or a foreign country, and domiciled there.³ This result arises, *ex comitate*, from the regard due by one state to the laws of another; which *comitas* is founded not only in the highest policy, but in the essential rules of equity.⁴ It does not affect the prin-

¹ Fortoun, 19th Jan. 1610, M. 4429.

² Master of Saltoun, 5th July 1673, M. 4431.

³ Sinclair, 16th July 1636, M. 4501;

Falconer, 11th Dec. 1627, M. 4501.

⁴ Erskine, iii. 2. 39.

ciple on which such deeds are supported, that the payment stipulated by the deed, and the execution upon the deed, are intended to be in Scotland.¹ Deeds so executed will not only sustain personal execution against the granters, but may be the foundations of real diligence against heritable estate situated in Scotland, and will sustain claims in the distribution of such estate among creditors, and claims to the succession of such estate.² The rule, however, which supports deeds of the class before specified, though not executed according to the Scotch form, does not extend to actual conveyances of heritable estate situated in Scotland, unless, perhaps, when granted *inter vivos*, and for onerous causes. Actual conveyances, in order to be effectual as such, and though granted out of Scotland, by parties having a foreign domicile, must be authenticated with all the solemnities of the law of Scotland, in relation to probative deeds, in the same way as if the granter were domiciled and actually residing in Scotland.³ Thus a will, executed in the English form by a domiciled Englishman, and sufficient to carry heritage in England, was found ineffectual to convey land in Scotland.⁴ The same was found as to a will executed in Holland, and sufficient to carry heritage in that country.⁵ Neither will a heritable bond over lands in Scotland be carried by a grant of legacy made by an English testament.⁶ Nor will the price of lands sold, and which by the missives of sale is appointed to be made a real burden on such lands, be carried by a will executed according to the form of the law of England.⁷ The Acts⁸ subjecting money due on heritable bonds to inventory stamp-duty do not touch this point; neither do they, as to this point, extend to personal bonds secluding executors. It is very doubtful whether bonds of this last description will be carried by a will executed according to the forms of the law of England, and whether the conveyance thereof *mortis causa* must not necessarily be in the form applicable to heritable estate in Scotland.⁹ It was decided in Ross's case, that a will in the English form did not carry such personal bonds; but the case had drawn out great difference of opinion upon the Bench, and it is known to have been settled extra-judicially. It is therefore by no means an authority to be relied on; though, in practice, of course, care should be taken not to raise the question. Moreover, a disposition of heritable subjects in Scotland, made in England after the English form, will not even create an obligation on the granter to grant a more formal disposition.¹⁰ I cannot help thinking that the deed in the Earl of Dalkeith's case must have been a gratuitous disposition, though the report does not expressly say that it was. An onerous deed, in the form of a disposition,—though, if not in the Scotch form, it would

¹ Junquet la Pine, 14th Feb. 1721, M. 4451.

² York Buildings Co., 31st Jan. 1783, M. 4472; Govan, 10th Dec. 1790, M. 4476; and Cuninghame, 5th July 1706, M. 4462.

³ Erskine, iii. 2. 40.

⁴ Henderson, 10th June 1795, M. 4489.

⁵ Crawford, 14th June 1774, M. 4486.

⁶ Melvil, 3d July 1634, M. 4483.

⁷ Mead, 27th June 1828, 6 Sh. 1034; affirmed 16th Nov. 1830, 4 Wil. & Sh. 328.

⁸ 23 & 24 Vict. c. 15, & c. 80.

⁹ Ross, 4th July 1809, F. C.

¹⁰ Earl of Dalkeith, February 1729, M. 4464.

not operate as a conveyance,—would, I apprehend, be effectual as evidence of an obligation to convey, and might be enforced in Scotland as such.

I do not consider, however, that a person having a domicile in Scotland, and who happens for the time to be in England or a foreign country, ought to execute a deed, *inter vivos*, properly relating to a Scotch transaction, agreeably to the laws of the place of execution. I apprehend that deeds of the above nature ought to be executed by such parties, in England or wherever they are, according to the forms of the law of Scotland. I do not say that the deeds would be held improbativ in Scotland, if executed according to the laws of the place of execution; but that question should not be raised.

It is said to have been questioned whether a power of attorney or commission, not executed according to the law of Scotland, be a sufficient authority to the mandatory to execute a conveyance of lands. I apprehend that such a commission ought to be executed by the granter according to the laws of his foreign domicile, and that, if so executed, it would be valid and effectual for its purpose. The point has not, as far as I know, formed the subject of a regular judgment in the Court of Session; but in a petition under the Entail Amendment Act of 1848,¹ which, by sect. 50, requires the consent of heirs of entail to the granting of feus of an entailed estate, to be duly tested according to the law of Scotland, the Court have allowed a commissioner, acting for a party domiciled abroad, to grant consent for that party to the feuing of entailed lands, in virtue of a commission, executed according to the laws of the party's foreign domicile.² On this point you may further consult the opinion of Lord Fullerton, in the case of Leith.³

DOES A COM-
MISSION BY A
FOREIGNER,
AUTHORISING
ANOTHER TO
CONVEY LANDS,
REQUIRE AU-
THENTICATION
IN THE SCOTCH
FORM?

With reference to the mode of authenticating wills and testamentary instruments, applicable to personal estate only, executed out of Scotland, by persons domiciled in Scotland at the time of execution, or executed in Scotland, by persons so domiciled, but who shall acquire an English or foreign domicile before their death, the law of Scotland was by no means clear and satisfactory, until the passing of the Act of 1861. It was doubtful, on the one hand, whether the will of a domiciled Scotchman, executed out of Scotland, was valid, even though authenticated according to the forms of the place of execution; and, on the other hand, whether the will of one so domiciled at the time of execution, and which was executed in conformity with the law of Scotland, was not revoked by implication, in case the testator should be domiciled furth of Scotland at the time of his death. These points recently came before the Court in more cases than one, and threatened to prove fertile sources of litigation; but happily all risk of future doubt or question thereon has been removed by the Act of 1861,⁴ which enacts, by sect. 1, That 'every will, and other testamentary instrument, made out of the United King-

AUTHENTICA-
TION OF WILLS.

¹ 11 & 12 Vict. c. 36.

² Campbell *Petitioner*, not reported.

³ Leith, 6th June 1848, 10 D. 1218.

⁴ 24 & 25 Vict. c. 114.

'dom, by a British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death), shall, as regards personal estate, be held to be well executed,' 'if made according to the forms required,' (1.) 'either by the law of the place where the same was made,' or (2.) 'by the law of the place where such person was domiciled when the same was made;' or (3.) 'by the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin.'

By sect. 2, 'every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made.'

And by sect. 3, 'no will or other testamentary instrument shall be held to be revoked, or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same.'

These enactments will meet all the difficulties above adverted to, in cases to which the Act applies.

Any question in reference to wills or testamentary instruments regarding personal estate, made by parties who died before the date when the Act came into operation (6th August 1861), is matter of law rather than of Conveyancing, and need not be discussed here. These points will be found elaborately argued in the case of *Purvis*.¹ In that case a person, who was born in Scotland, but had acquired a domicile in the Netherlands of India, made his will in India, and according to the Indian forms, whilst he was domiciled there. Subsequently he re-acquired a Scotch domicile, and died a domiciled Scotchman. Lord Benholme, Ordinary, and afterwards the Court, sustained the will as valid, in respect to personal estate in Scotland belonging to the testator at the time of his death, and the case does not appear to have been appealed. A corresponding decision had previously been pronounced by Lord Ardmillan, Ordinary, in the case of *Fleming v. Young*, which was very nearly parallel to *Purvis*'s, but which was compromised before being disposed of in the Inner House. I need only add, on this subject, that foreign jurists appear to be very much divided on this question; and that Justice Story² comes to a conclusion different from that arrived at by our judges.

I shall have occasion, when on the subject of the completion of titles, by the next of kin of persons deceased, to the deceased's personal estate, to call your attention to the Act 24 and 25 Vict. cap. 121, entitled 'An Act to amend the law in relation to the wills and domicile of British subjects dying whilst resident abroad, and of foreign subjects dying whilst resident within Her Majesty's dominions.' This Act was passed

¹ *Purvis*, 23d March 1861, 23 D. 812.

² *Story's Conflict of Laws*, §§ 464-473.

on the same day with the Act of which the provisions have been fully quoted above.

The case of Purvis, and the Act 24 and 25 Vict. cap. 114, have reference to personal estate only. With regard to heritable estate in Scotland, the rules of law are clear and beyond dispute. *Mortis causa* conveyances of such estate require, as already stated, to be executed according to the forms prescribed by the law of Scotland, in reference generally to deeds affecting heritable estate; the rules as to which have already been explained. But when a domiciled Englishman has conveyed heritable estate in Scotland to trustees, by a formal disposition duly executed according to the law of Scotland, and referring to a will made, or to be made, for declaring the purposes to which such estate is to be applied, such disposition and will taken together—the will being duly executed, and duly referring to the trust-disposition—will be effectual to convey the heritage for the purposes so declared.¹ It is to be observed, however, that the above Act has no operation as regards wills or other writings, viewed as directions for the conveyance or disposal of heritage in Scotland. The law as affecting such wills or writings remains unaffected by the Act.

THESE ACTS
RELATE TO
WILLS OF
PERSONAL
ESTATE ONLY;

DIRECTIONS TO
TRUSTEES FOR
DISPOSAL OF
LANDS CAN BE
GIVEN BY WILL.

As already stated, personal contracts and personal obligations, in order to be available elsewhere, must be valid according to the law of the place where they are executed. A party resident in England made an indorsation there of an account alleged to be due to him by Scotch debtors, but not contracted in Scotland. Such indorsation would apparently have been held effectual by the law of Scotland, as a mandate, if made in Scotland, but was null according to the English law. It was found inoperative as a title to sue in a Scotch Court.² The question whether, in point of fact, a foreign private deed is or is not executed according to the law of the place where it is made, is settled by obtaining an opinion on that point from eminent counsel of the country where the deed was executed. In proof of the authenticity of foreign official documents, a certificate is necessary that the subscriber holds office as stated, and is the proper party to issue or authenticate the document. This certificate must be obtained from a British consul, or the Mayor of the town, or a notary-public.³ We are, however, in the habit of admitting as probative, and as conferring a title to sue in Scotland, English probates and letters of administration, without such evidence;⁴ but before extract it will be necessary to obtain confirmation in Scotland,⁵ or the equivalent introduced by the 'Confirmation and Probate Act, 1858,'⁶ viz., the commissary clerk's certificate that the probate has been produced in his Court, and a copy deposited with him.

And here it may be proper to notice that an English or Irish com-

¹ Ker, 24th Feb. 1829, 7 Sh. 454; Cameron, 19th May 1831, 9 Sh. 601; affirmed 9th Aug. 1833, 7 Wil. & Sh. 106.

² Tayler, 16th July 1847, 9 D. 1504.

³ Disbrow, 27th Nov. 1852, 15 D. 123.

⁴ Clerk, 20th Dec. 1759, M. 4471, 5 Br. Sup. 369.

⁵ Stewart, 21st Nov. 1826, 5 Sh. 29.

⁶ 21 & 22 Vict. c. 56, s. 14.

mission of bankruptcy gives the assignee (equivalent to the trustee in a sequestration in Scotland) right to the whole estate of the bankrupt, heritable as well as moveable, situated in Scotland; the trustee in a Scotch sequestration having corresponding rights as to the bankrupt's estate situated in England, Ireland, or Her Majesty's other dominions. This is specially provided by the Bankrupt Acts for each of the three kingdoms respectively,¹ and, on the principle of the *comitas* due to foreign countries, an American commission of bankruptcy carries to the assignee the whole of the bankrupt's moveable estate situated in Scotland.²

In regard to the interpretation of such personal obligations or contracts as we have just been considering, the general rule is that they are to be construed according to the *lex loci contractus*. So in a case between a wife and the trustee on the bankrupt estate of her husband, as to the *jus mariti* over property devised to her under an English deed, which apparently excluded that right, it was held that the question of construction fell to be decided by the laws of England.³ So also, when a marriage took place in England between natives of Scotland, and provisions were settled on the wife by deeds in the English form, it was held that the legal import of the deeds fell to be regulated by the law of England.⁴ And even when foreign deeds contained stipulations, as to payment of interest, which could not have been made by the laws of this country as they then stood, the stipulations have been allowed effect when there was no suspicion of an attempt to evade our laws.⁵ In Campbell's case, a summons, raised in Scotland for payment of a debt contracted in South Carolina, concluded for payment of the debt, 'with the lawful interest,' which was held to mean 7 per cent., being the rate current on similar debts in South Carolina, as shown by the opinions of counsel produced in the cause. On the other hand, if, by the *lex loci*, the debt is one on which no interest is allowed, as in England in the case of a book debt, effect will equally be given here to such law.⁶ And where a lady had, in an antenuptial contract of marriage, entered into with a Scotchman abroad, but in foreign form, accepted a jointure in lieu of every right she might have over the funds of her husband, she was held to have thereby validly renounced all right of terce or aliment out of her husband's estate in Scotland.⁷

Questions of law arising upon deeds executed out of Scotland, and which are to be construed according to the law of the place where such deeds are made, required formerly to be solved by obtaining the opinion of counsel of the country where the deed was executed,—and as to foreign

¹ The English Act, 24 & 25 Vict. c. 134; the Irish Act, 20 & 21 Vict. c. 60; and the Scotch Act, 19 & 20 Vict. c. 79.

² Maitland, 4th March 1807, M. App. Bankrupt, 26.

³ Cross, 14th May 1830, 8 Sh. 746.

⁴ Ramsay, 11th July 1833, 11 Sh. 967.

⁵ Campbell, 15th Feb. 1809, F. C. See also Wilkinson, 28th June 1821, 1 Sh. 90.

⁶ Gillow and Co., 21 May 1824, 3 Sh. 45.

⁷ Countess of Findlater, 8th Feb. 1814, F. C.

countries, the rule remains the same. But, as to Her Majesty's dominions, the Act of 1859,¹ 'to afford facilities for the more certain ascertainment 'of the law administered in one part of Her Majesty's dominions, when 'pleaded in the Courts of another part thereof,' makes provision for obtaining the opinion on such questions of law from one of the Superior Courts in the part of the Queen's dominions the law of which it is desired to ascertain. This is done by submitting a case, adjusted at the sight of the Judges of the Court where the cause is depending, to the Judges of the Superior Court in that part of the Queen's dominions the law of which is to be ascertained, for their opinion, which opinion, when obtained, forms the rule in reference to the point to which it relates. The decision given by the Court, which seeks the opinion of another Court, in terms of such opinion, is subject to review, as far as the judgment of the Court by which the opinion is given is so. And it must be truly a point of law, proper to the foreign country, that is resolved in this manner. If the interpretation is not dependent upon the foreign law, or upon its technical rules, but is to be dealt with according to the plain construction of the words, the Judge of any Court is entitled and bound to give his judgment, according to his own understanding of the words used. The construction in such a case is not matter of foreign law, and the Court here is not bound by the opinion of the foreign lawyer on the question of construction.²

¹ 22 & 23 Vict. c. 63.

² *Thomson's Trustees*, 18th Dec. 1851, 14 D. 217.

CHAPTER IV.

WRITINGS *in re mercatorid.*

WE now proceed to the case of writings *in re mercatorid*, which form a large and very important class of privileged writs.

Professor Bell¹ describes these as 'bills, promissory-notes, and checks on bankers; orders for goods, mandates and procurations, guarantees, offers and acceptances to sell or to buy wares and merchandise; or to transport them from place to place; and in general, all the variety of engagements or mandates or acknowledgments which the infinite occasions of trade may require.'

The Court of Session classed among these the banker's entry in a bank pass-book;² holding that the bank pass-book was not the copy of the account kept in the bank books, but that each entry, by the banker, of money paid in, was a separate complete receipt for such money. But the House of Lords altered, and remitted the case for further consideration;³ holding that the pass-book was not proof, but only *prima facie* evidence, liable to be rebutted; and the object of their remit was to take proof, *prout de jure*, in opposition to the pass-book.

Missive letters, engaging to join in a bill, given as security for rent, are *in re mercatorid*, and entitled to be held privileged writings.⁴ So also is a letter of guarantee of an account, for past as well as future furnishings.⁵ The main question tried in Paterson's case was,—whether the guarantee was privileged so far as granted for *past* furnishings. The Court found that it was so. But a missive, in order to have the benefit of the privileges, must be *in re mercatorid*; an obligation of relief from payment of an ordinary bond is not privileged.⁶ Neither is a simple acknowledgment that the granter owes the grantee a sum of money borrowed.⁷ Fitted accounts among merchants are amongst privileged writings;⁸ also fitted accounts generally, when applicable to mercantile matters. In the case of Campbell,⁹ an attempt was made to open up a general discharge of all claims, following on a long correspondence, and

¹ Bell's Commentaries, i. 325.

² Rhind, 24th Feb. 1857, 19 D. 519.

³ 10th Feb. 1860, 32 Jurist, 283.

⁴ Henderson, 5th Dec. 1765, M. 16,986.

⁵ Paterson, 31st Jan. 1810, F. C.; affirmed 4th July 1814, 6 Paton, 38.

⁶ Crichton, 21st July 1772, M. 17,047.

⁷ Hamilton, 2d December 1858, 21 D. 51.

⁸ Lealy, 27th Jan. 1714, M. 16,978.

⁹ Campbell, 10th May 1822, 1 Sh. 446.

in consideration of a sum of money paid,—in respect, *inter alia*, that the discharge was not duly authenticated. The attempt was unsuccessful; but, except when the transaction is very clearly *in re mercatoriâ*, the discharge on a compromise, or settlement of claims, ought to be authenticated as an ordinary deed.

The privileges of writings *in re mercatoriâ*, as regards their authentication, are—(1.) That, although not holograph, witnesses are not required to prove their authenticity; (2.) That witnesses are not required, as in holograph deeds, to prove the date; (3.) That even subscription 'by initials, or by a mere mark, provided it be proved or admitted to be genuine, and to be the accustomed mode of the person transacting business, is sufficient;'¹ and the privileges have been conceded on account of the 'necessary rapidity of the operations of trade, the confidential methods of transacting business which are necessary or unavoidable, and the circumstance that they often regulate transactions between subjects of different states, among whom the peculiarities of municipal law cannot be admitted.'

The last class of privileged writings which we shall refer to is that of receipts to tenants for rent. These, by the usage of Scotland, need only to be subscribed by the landlord, or some one duly authorized by him, let the sum be ever so considerable.² In Boyd's case such receipts were sustained, in respect of the custom, and by reason of the great and exuberant confidence betwixt landlords and tenants.

RECEIPTS TO

TENANTS.

A short reference may here not be out of place to cases in which special forms of authentication have been sanctioned by Acts of Parliament; indeed, the particular documents, or classes of documents falling under such Acts, may be regarded as thereby *privileged* in regard to the mode of execution.

SPECIAL STATUTORY FORMS OF AUTHENTICATION.

Thus, by the 'Crown Private Estates Act,' passed in 1862,³ 'All dispositions, conveyances, deeds of appointment, commissions, powers of attorney, wills, deeds of settlement, and other deeds or instruments to be made or granted by Her Majesty, her heirs or successors, of or relating to the private estates of Her Majesty, her heirs or successors, situate or arising in Scotland, shall be valid and effectual, although not executed according to the forms of the law of Scotland, if the same shall be under the sign manual, attested by two or more witnesses: And every such disposition or conveyance, if granted *mortis causâ*, shall be valid and effectual, whether the same shall be under the sign manual as aforesaid or shall be signed by some other person in the presence of the granter, and by his or her direction, in the presence of two or more witnesses, who shall attest the same, although the same shall not be executed according to the forms of the law of Scotland.' This last alternative, applicable to the case of *mortis causâ* dispositions or convey-

CROWN PRIVATE ESTATES ACT.

¹ Bell's Commentaries as above.

² 25 & 26 Vict. c. 37, s. 6.

³ Erskine iii. 2. 23; Boyd, 7th Nov. 1674, M. 12,456.

ances, places the execution thereof as nearly as possible on the footing on which the execution of wills in England was placed by Lord Campbell's Act of 1837, previously referred to.¹

**COMPANIES
ACT.**

By the 'Companies Act, 1862,'² the writings whereby public or joint-stock companies are in future to be formed and incorporated, viz., the 'memorandum of association,' and the 'articles of association,' are appointed to be signed by each subscriber or member in the presence of 'one witness at the least.' Such attestation is declared sufficient in Scotland, as well as in England and Ireland; and the relative schedules seem to show that where one and the same witness attests the signatures of two or more members, it is not necessary for the witness to sign more than once. In a case or form given in these schedules, the same witness is made to attest the subscription of seven members, thus: 'Witness to the above signatures, A. B., No. 13 Hule Street, Clerkenwell, Middlesex.' It seems intended, however, that each witness should specify in his attestation the member or members whose signatures he attests. The memorandum and articles of association need not have the members' seals affixed. They require to be registered in the Register of Joint-stock Companies.

**MERCHANT
SHIPPING ACT.**

By the 'Merchant Shipping Act, 1854,'³ the bill of sale of a ship, or share of a ship, as given in Form or Schedule E annexed to the Act, will be duly executed by the party signing and affixing his seal to it in presence of one witness, who will sign under an attestation or certificate in these words, 'Executed by the above-named A. B. in the presence of E. F.,' the witness also inserting his description and place of residence. The testing clause runs simply thus: 'In witness whereof, I have hereto subscribed my name and affixed my seal, this day of 18 .' The signature of the party is to be adhibited at the usual place on the right-hand side of the deed. The seal, which in general is affixed at the same side, immediately after and in a line with the subscription, seems intended to have its place in the bill of sale on the left-hand side, immediately above the witness's attestation.

Mortgages over ships, or shares of ships, and the transfers of such mortgages, are to be executed in the same manner (Forms I and K). These forms do not bear expressly that the witness is to add his description and place of residence, but such addition can plainly do no harm.

Various other documents connected with ships will be found in the schedules or forms annexed to the last-mentioned Act. In some cases the mode of authentication is the same, in others different from that in the forms above given; but it is not necessary here to enter more fully into the particulars of the various documents.

By many acts of incorporation of railway and other public or joint-stock companies, transfers of stock or shares are declared duly executed

¹ 1 Vict. c. 26, s. 9.

² 25 & 26 Vict. c. 89, ss. 11 & 16.

³ 17 & 18 Vict. c. 104.

when the seller and purchaser respectively subscribe and affix their seals in presence of one witness, who subscribes his name with the addition of his description or designation and place of residence. And by the Royal Charter incorporating the Royal Bank of Scotland, special modes of executing and attesting not merely transfers of the stock of the Bank, but also powers of attorney for such transfers, are laid down; and no doubt there are numerous other special cases under such charters or under Acts of Parliament.

As a general rule, the place of subscription seems not to be specified in the above cases. The deeds usually contain a date, but only one date, though they may happen to be executed by several parties on different days. They do not, however, mention the number of the pages, the name or designation of the writer, nor the name and designation of the witness or witnesses. But they relate (with the single exception of the Crown Private Estates Act) to personal estate exclusively, and, most of them being applicable to English and Irish as well as Scotch transactions, it has been deemed important that the mode of authentication should be the same for all the three countries, and that the form specially adopted in each case should approach more nearly to that followed in England than to the Scotch form. Experience will show how far the modifications, sanctioned by these Acts and charters, can be adhered to, without the risk of forgery or of inconsiderate haste.

I proceed now to the method of authenticating Judges' interlocutors, and the official acts and decreets of which they are the warrants.

AUTHENTICA-
TION OF INTER-
LOCUTORS, ETC.

The Act 1686, cap. 3, ordains 'that all interlocutors pronounced by the Lords of Council and Session, and all other Judges within the kingdom, shall be signed by the President of the Court, or the Judge pronouncer thereof;' and 'prohibits the Clerks, upon their peril, to extract any acts or decreets, unless the interlocutors, which are the warrants thereof, be signed, as said is: Declaring the extracts which shall be given out otherwise to be void and null;' and by 1693, cap. 18, all interlocutors and acts of the Court must be signed by the Judge in the chair, in presence of a quorum of the Lords sitting in judgment, under pain of nullity and deprivation of the writer. Accordingly the Judge, in the Court of Session, who signs, always adds to his subscription the letters '*I.P.D.*,' i.e., *in presentid Dominorum*. The Act of 1686 has been held not to apply to the deliverances of presbyteries, chiefly on the ground of usage.¹

In the Court of Session, the interlocutors of the Outer House ought to be written by one of the Depute-Clerks of Session or his assistant.² The interlocutors of the Inner House ought to be written by one of the Principal Clerks of Session.³ In the case of the necessary absence of the clerk whose proper duty it would be to write the interlocutor, any of the

¹ Fergusson, 2d July 1850, 12 D. 1145; affirmed, 1 Macquoen, 232.

² Shand's Practice, p. 106.

³ *Ibid.* p. 103.

remaining Principal Clerks, or any person appointed by the Division of the Court to which such absent Principal Clerk may belong, either from among the Assistant or Depute-Clerks, may discharge his duties.¹ Such interlocutors ought to be free of erasures or other vitiations *in substantialibus*. I do not know of any reported case on that point; but in one unreported case (a disentail under the Rutherford Act) it was represented to the Court that a material word in the interlocutor of disentail was written on erasure, and the Court repeated the interlocutor, without, however, admitting that this was absolutely necessary.

In general, official extracts of acts and decreets of Court are authenticated by the signature of the Clerk of Court.² Extracts of acts or decreets of the Court of Session are authenticated by the signature of the Principal Extractor appointed under the Act 1 and 2 Vict. cap. 118, sect. 18, or during his necessary absence by his assistant. Before this Statute came into operation, extracts of such acts and decreets were authenticated by one of the four Extractors appointed by the Principal Clerks of Session; and it is important to observe that by the Act of Sederunt of 6th March 1829, which was in operation from 1st May 1829 to 24th December 1838, every such extract required, under pain of being improbativ, a docquet in the handwriting of the officer by whom the extract was signed, stating by whom it was written, by whom collated, and at what date it was completed by signature of the Extractor. But by the Act of Sederunt of 24th December 1838, sect. 6, the docquet was dispensed with as to future cases, and instead thereof the Extractor is to specify in writing, on the last page of the extract, the date of completing the same by his subscription.

We have, in addition to proper judgments of Courts or judicial sentences, the decret or sentence-arbitral,—and in the case of the Earl of Hopetoun³ you will find several Judges, particularly Lord Deas (who quoted Lord Rutherford, then deceased, as having seen and approved of his opinion), holding the sentence of an arbiter, which was executed in England, under a regular submission, as capable of enforcement, provided only it is signed, and the Court are satisfied that it is authentic. In illustrating his views, Lord Deas observes, that ‘the sentence-arbitral is ‘truly part and parcel of every Scotch contract of submission, and used ‘accordingly to be signed by the persons submitters as such. All formalities in that sentence-arbitral, assuming it to be signed and authentic, may be dispensed with, either by the express or implied consent of ‘parties.’ It is of course useful to have these views before us; but, without questioning the power of parties to the submission of an ordinary dispute, by their mutual consent, to adopt their own form of authentication, Conveyancers will keep in mind that the practice, in regard to Scotch decrees-arbitral, is to authenticate them in the same manner as ordinary probative writs; and no other course should be followed.

¹ 1 & 2 Vict. c. 118, s. 8.

² Stair, iv. 42. 10.

³ Earl of Hopetoun, 6th March 1856, 18 D. 739.

TITLE III.

DELIVERY AND ACCEPTANCE.

As a general rule, all voluntary deeds, in order to be obligatory, require to be delivered by the granter, and (if not *mortis causa*) during his lifetime. Delivery to the grantee, whereby the granter puts the voluntary deed beyond his own power, is the expression of his final purpose concerning such deed ; which purpose is held to be not taken, as long as the deed remains in the custody of himself, or of any one for him.¹

The rule, however, above stated, is not without qualification. When a party is in possession of a deed in his own favour, it is generally presumed that such deed belongs to him ; but in each particular case the whole facts and circumstances must be looked to. The question is, whether the deed is in the hands of the grantee in such a way as to be beyond the control of the granter ;² and it has sometimes been found difficult, in particular circumstances, to determine whether, in point of fact, deeds which require delivery to their full and complete efficacy have been delivered or not.

There are two reported cases which bear the strongest resemblance to each other, but in which the decision of the Court was different :

(1.) *Stamfield's creditors*,³—in which an assignation by Stamfield, in favour of one who was a cautioner for him, and otherwise his creditor, was placed by the granter on his table, subscribed and addressed to the grantee, whom he informed of this at a meeting on a Saturday, when he also stated that he was just going to the country, and that, when he returned on Monday, the deed should be delivered to him. Stamfield was murdered on the night of the meeting. The assignation was found on his table, after the murder, subscribed and addressed as stated ; but it was held undelivered, as it had never been placed beyond his power, and he might have destroyed it, if he had thought fit.

¹ *Erskine*, iii. 2. 43 & 44 ; *Irvine*, Nov. 1738, M. 11,576.

² *M'Aslan*, 17th Feb. 1859, 21 D. 511.

³ *Stamfield's Creditors*, 22d Dec. 1696, 4 Br. Sup. 344.

(2.) *Crawford*,¹—in which a letter containing money and a bill, which the writer had addressed, wafered, and given, with a penny for postage, to his servant, to be put into the post-office, was held delivered, though the writer died suddenly while the letter still remained in his house; but his instructions regarding it had not been recalled, and the party to whom it was addressed was found entitled to its contents. This case, perhaps, was somewhat special. A bill, by the writer of the letter, fell due the following day. The letter was addressed to the creditor in the bill, and the money and bill enclosed in it were intended to retire the bill first mentioned. Besides this, the writer of the letter had made an entry, in his books, of the contents of the letter as actually remitted in payment of his own bill. In these circumstances, the letter was held to be as good as posted, though not actually so, when the writer suddenly died. The case is still one of some nicety and difficulty, but it presents various features which did not occur in *Stamfield's*.

It is not indispensable that the delivery be actually to the grantee of the deed. Thus, a deed by a father to his son, being placed in the hands of the son's wife, was held delivered to the son.²

When the deed is deposited in the hands of a third party, the object of the depositions, if validly proved, will receive effect. That object ought always to be expressed in a probative writing. In a case where that had been done, the Court refused to refer to the depositary's oath to redargue the written terms of deposition.³ But the writing in which the object of the deposition is expressed must be probative. In the case of *Logan*,⁴ a party placed his settlements in the hands of his ordinary agent, in a sealed packet, on which was endorsed a note in these terms, 'Mr. Logan of Edrom's settlements. *Edrom, 5th May 1818*.—Deposited with David Turnbull, Writer to the Signet, to be by him destroyed unopened, in case of my decease before the 28th day of May current.' This note was subscribed, but not written, by Mr. Logan, who died before the day named. The Court held that his agent was not properly a depositary, and that the writing, not being holograph, was improbativ. They therefore gave no force to it, and would not allow the deeds to be destroyed.

When the deposition has been made without writing, the purpose or terms of it are matter for proof, just like any other fact. When the holder of a deed happens to be agent for both the grantor and the grantee, *Erskine* says⁵ that the deed was presumed to have been given him for the grantee, stating, as his authority, a case not reported.⁶ But the question, even when the holder acts for both parties, is still one of fact and intention. The character impressed on the deposition, when it took place, is to be ascertained by evidence; and there is no higher legal pre-

¹ *Crawford*, 18th Nov. 1807, M. App., Moveables, No. 2.

² *Agnew*, 1st Dec. 1767, 5 Br. Sup. 431.

³ *Cowan*, 24th Feb. 1675, M. 12,379.

⁴ *Logan*, 27th Feb. 1823, 2 Sh. 253.

⁵ *Erskine*, iii. 2. 43.

⁶ *Seton*, 1735.

sumption in favour of the grantee than of the granter. Several questions have arisen within comparatively recent periods in which this point has been discussed. It so happens that the deeds held by the mutual agent have been found to have been delivered to him for the grantees; but that was only as matter of fact in the particular case, not on the ground of legal presumption. Each case depended on its own circumstances. I refer to the cases of Ramsay,¹ where a gratuitous bond of annuity, by one brother to another, which contained no power of revocation, and was held to have been acted on, was found to have been delivered; and Maiklem,² in which case also the result was the same, the matter of fact having been tried before a jury.

A very important point, both as regards law and practice, in reference to delivery, occurred in the case of Mair and Sons,³ where it was established that a bond and disposition in security, in ordinary form, deposited with an individual acting as agent of both parties, may in part be allowed, and in part be refused, the effect of a delivered evident. A loan had been contracted for, one and the same agent acting in the transaction for both parties. The lenders placed the full amount of the loan in the hands of the agent, who paid over more than two-thirds to the borrower, taking from him a bond and disposition in security for the whole; but giving him a letter, expressing that, notwithstanding the terms of the bond, only a certain portion of the loan had been actually advanced, and the agent retaining the bond in his own hands unrecorded. The agent died while matters were in this state; and his executors, notwithstanding an injunction to the contrary from the borrower, delivered the bond to the lenders, who placed it on record. The Court were of opinion that, notwithstanding this delivery, the bond remained in the same condition as at the time of the mutual agent's death, and that it was then in his hands for the lenders, to the extent only of the sum actually paid over by him for them to the borrower, and, *quoad ultra*, for the borrower, to which last extent they reduced the bond. The opinions of the Judges in this case, which was one of great nicety, ought to be attentively perused; and the case suggests a warning against the same agent acting for both parties, in transactions where the parties have opposite interests.

But, even with separate agents, a peculiarity, which sometimes occurs in practice, would apparently have required to be provided against in this case; because it seems to have been the understanding of the parties that the full amount of the loan should not be advanced to the borrower at once. The plan which was in view in Mair's case, in order to save the rights of both parties, was to make the advances on account of the loan by instalments, and to retain the bond and disposition in security, unrecorded, until the whole sum should be advanced.

¹ Ramsay, 15th Jan. 1828, 6 Sh. 343; affirmed, 25th March 1830, 4 Wil. & Sh. 58.

² Maiklem, 29th March 1842, 4 D. 1182.

³ Mair and Sons, 20th Feb. 1850, 12 D. 748.

But that was not satisfactory or safe. In particular, it exposed the lenders to risk, as the borrower might have become bankrupt, or he might have granted other securities, which, by being placed first on the register, would have defeated the preference stipulated for by the grantees of the first bond. The safe, and I believe the usual, course in such circumstances (for transactions of this nature, though not desirable, must occasionally be dealt with) is to advance the whole amount of the loan as soon as the bond and disposition in security is completed, and ready to be delivered and recorded. The bond is thereupon delivered and recorded. There is at the same time handed over to the borrower so much of the loan as, by agreement, he is entitled immediately to receive, and the balance is placed in bank, subject to the joint orders of the borrower and lender, to be uplifted from time to time (or as the case may require), on the borrower fulfilling the conditions on which the money is to be made available to him. The borrower will pay interest on the full amount of the loan, from the date of the advance, and he will draw the interest on the deposit in bank. All this should be expressed in a probative minute or letter, subscribed by or on behalf of all concerned, of the date of the delivery of the bond and disposition in security; and this document requires no clause of registration, and may, therefore, be on an agreement stamp. Usually, however, a letter on plain paper is held sufficient. In this way, the lender gets his security completed at the time of making his advance; he is also protected against loss through non-fulfilment of the conditions upon which the advance of a certain portion of the loan is suspended; and the borrower is secured in obtaining the balance of his loan, because the money is in bank, ready to be uplifted and paid over to him, as soon as he fulfils his own part of the mutual agreement.

Where the depositary is not the agent of both parties, Lord Stair holds the presumption to be in favour of delivery;¹ but Erskine² correctly distinguishes between onerous and gratuitous deeds, as to that point, referring to the case of Ker,³ where a gratuitous writing, placed with a stranger, was held to be open to recal by the granter during his lifetime, and only delivered to the grantee if not so recalled.⁴

After a deed appears in the hands of the grantee, it is said by Sir G. Mackenzie⁵ that the presumption of delivery to him is so strong that it cannot be elided but by the grantee's writ or oath. But we have seen from M'Aslan's and Mair and Sons' cases that this rule is open to qualification and exception; and in the case of Ogilvie,⁶ a disponent having been examined on oath, and not proving warrantable possession of a deed which had got into his hands through a deceased depositary, the Lords found the deed undelivered. All deeds, however, warrantably coming

¹ Stair, iv. 42. 8.

² Erskine, iii. 2. 43.

³ Ker, 25th Jan. 1677, M. 3249.

⁴ See also Holwell, 31st May 1796, M. 11,583.

⁵ Mackenzie's Institutions, iii. 2. 6.

⁶ Ogilvie, 14th July 1699, 4 Br. Sup. 446.

into the grantee's hands, especially those which are onerous, will be held as delivered of their date.¹

Upon lawful and complete delivery, the deed becomes the absolute property of the grantee, and his right cannot be limited to a trust, except by his own writ or oath.² Special difficulties, however, are sometimes created in reference to the legal question of delivery, by peculiarities in the form of deed executed on completing a transaction. Thus, in the case of Hill,³ a father, when lending money belonging to himself, took a bond which acknowledged receipt of the loan from him for himself and in name of his eldest son, and contained an obligation for repayment to the son; whom failing, without heirs of his body, to the father. The son predeceased the father without issue, but leaving a will conveying generally his whole estate to his brother. Meantime the bond had remained in the father's hands, and the Court preferred the father to the son's executor; apparently on the ground that the bond was intended, not as a present gift, but only as a *mortis causa* provision to his son, and gave the son no more than a bond by his father to him, not delivered, but subject to the father's power over it, would have done. A somewhat similar question occurred in the case of Balvaird;⁴ where a party purchased a house, and paid the price out of his own funds, but took the conveyance to a third party, to whom apparently he stood *in loco parentis*; the conveyance bearing, contrary to the fact, that the disponent had paid the price. The conveyance, however, of the existence of which the actual disponent had been made aware, was delivered to the real purchaser, who, during his lifetime, kept the same in his own hands, and drew the rents of the property, and otherwise administered it. He likewise not only did not pass infestment, but, with his own hand, inserted his own name as having paid the price, deleting, in the clause of acknowledgment of the price, the name of the disponent. Subsequently, he conveyed his whole estate to his wife, and she was found entitled to the house; the Court holding the deed as delivered to the purchaser for himself in the first place, and subject to his control. This principle was carried further, in a case of special circumstances,⁵ where the sum in a banker's deposit-receipt, taken by a father in name of his son, but found in the father's repositories undelivered at the time of his death, was held to belong to the father's estate.

The cases of Hill and Balvaird cannot fail to suggest that the deeds brought before the Court ought to have been differently framed. Assuming that they were strictly in terms of instructions regularly given on both occasions, the parties ought to have been advised to make *themselves* the disponents, and their intended successors substitutes only; or in some other way to have preserved to themselves expressly full power over the subjects contained in the deeds. In these cases, there was

¹ Gordon, 1st Dec. 1757, M. 11,165, Branch iii. of the case; and Maitland, 1st Dec. 1767, 5. Br. Sup. 431.

² Erskine, iii. 2. 43.

³ Hill, 2d July 1755, M. 11,580.

⁴ Balvaird, 5th Dec. 1816, F. C.

⁵ Keddie, 24th November 1848, 11 D. 145.

nothing of the nature of an onerous right or claim on the part of the nominal grantees as against the real grantees. The nominal grantees were in fact substitute heirs, subject to the absolute right and power of the real grantees to alter the destination and exclude them; and, as the deeds had been delivered not to the nominal but to the real grantees, the latter had, and retained, full power to deal with the subjects at their pleasure. But, where the relation of debtor and creditor subsists between the parties, the result may be different. Thus, where a party took a bond, for money due to him, not to himself but to one who was his creditor, intending such bond to operate as a payment to account of the debt due by him to his creditor, the bond, though delivered to the party who had advanced the money, and not to the grantee, was found to belong to the grantee, who was held entitled to compel delivery.¹ And, even where the relation of debtor and creditor does not subsist, delivery to the nominal grantee (or what is equivalent to such delivery) will terminate the right of the real transactor, and transfer the subjects to the party in whose name it is conceived. This will appear by contrasting the cases of Hill and Balvaird with that of Spence;² where a father, having sold land, took the purchaser bound by the missives of sale to pay the price, and grant bond therefor, to him in liferent allenary, and to his two sons *nomination* in fee. But having, at the purchaser's request, got his sons to sign a *P.S.* to the missives, agreeing, as he himself had done by the missives, to let the price stand over unpaid for eight years, it was held that the sons had acquired the absolute right to the fee, and that the missives could not be altered, although no deed had followed on them, and in fact the father remained feudally undivested of his lands. The communication to the sons not only made them acquainted with the destination of the price to their father in liferent allenary, and to them in fee, but it was followed by an act on their part in the character of fiars (the consent to postpone the payment of the price), which act was thought by Lord Mackenzie more conclusive, as inferring delivery to them of the purchaser's obligation to pay the price, than putting a conveyance of such obligation on the record would have been. The case of Collie,³ though affected by special circumstances, is another in contrast to those of Hill and Balvaird. In Collie's case, money was lent by Mr. Pirie, the bond therefor being, at his desire, granted to trustees for behoof of his grandchildren, reserving his own liferent. The bond was deposited with one of the trustees, and was held to have been delivered, because the lender's intention of making an irrevocable gift to his grandchildren was thought established, *inter alia*, by examination of the agent who, under his instructions, wrote the deed, and also of one of the trustees under the deed. The opinions of Lord Ivory, Ordinary, and the Court in this case, are very instructive. The Lord Ordinary's interlocutor was not adhered to, but

¹ Bain, 27th February 1678, M. 9128, 9130.

affirmed 25th March 1829, 3 Wil. & Sh. 380.

² Spence, 17th Nov. 1826, 5 Sh. 17;

³ Collie, 22d Jan. 1851, 13 D. 506.

the principles regulating the question of delivery in cases like those we are considering, as laid down by him, were approved on all hands. They were thus stated : ' Had that bond lain in the hands of Mr. Pirie, it is ' thought there could be no doubt—as regards any completed right in the ' grantees—that it must have been held as not delivered, and, of course, ' still within the power of Mr. Pirie to recal, cancel, or dispose of at ' pleasure.' In such circumstances, you will observe, Collie's case would have been exactly parallel to Hill's and Balvaird's. Referring to Spence's case, Lord Ivory says, ' The very difficulty that arose, as to the effect of ' communication to the grantees, establishes that nothing short of this ' would have excluded the power of revocation. On the other hand, had ' the deed been, by Mr. Pirie's directions, delivered absolutely and un- ' conditionally into the hands of Mr. Collie' (one of the trustees), ' to be ' held by him exclusively for behoof of the grantees and beneficiaries, ' there seems as little room for question that it must, under such circum- ' stances, have had to be dealt with as to all intents a delivered evident, ' and as beyond his power to revoke.'

There can be no doubt, therefore, that deeds in the circumstances of Hill's and Balvaird's are the property of the real party, so long as they are held by or for him, not delivered to the nominal grantee, or whilst nothing equivalent to such delivery shall take place. But it must be obvious that not only is there some risk attending the framing of deeds in that form, because a very slight matter—a mere want of acuteness and readiness—may raise a question of constructive delivery, or even, as in Spence's case, transfer the property contrary to the party's intention ; but, should the party become desirous of altering his purpose, he must go back to the granter of the deed, and get a new deed, or go through some judicial process for declaring his own right, and enabling him to exercise it in the way of selling, or assigning, or otherwise. He has placed the property apparently out of his own power. Moreover, though his right may be absolute and complete, no one can safely deal with him *de plano* as if it were so. And therefore, as already suggested, when parties wish to retain the full right of property and power of disposal, their advisers should oppose such forms of completing transactions, and, if possible, get the deeds taken to the parties themselves, and make those whom they intend to favour heirs-substitute only.

The rule that writs must be delivered to the grantee during the granter's lifetime suffers exception in several cases.

WHERE
DELIVERY
UNNECESSARY.

(1.) Deeds in which the granter has an interest, as, for example, a reserved liferent, are good without delivery to the others interested ; for, in the general case, it is presumed that the granter holds such deeds in his own custody, not because his intention concerning them is incomplete, but on account of his own interest.¹

(2.) Writings properly *mortis causâ* or testamentary do not require to be delivered, because these are not intended to have effect before

¹ Erskine, iii. 2. 44.

the maker's death. Such deeds usually contain express power of revocation; but, whether they do so or not, they are, when really *mortis causâ* or testamentary, valid on the granter's death, without previous delivery.¹ Neither is delivery necessary to validate a deed of revocation of a prior gratuitous deed granted subject to a reserved power to alter or revoke *etiam in articulo mortis*.² On the death of the granter, writings of a testamentary nature become effectual, so far as not altered by him; and the Court will order them to be delivered to the grantee;³ or, if several parties are interested, to be placed on record.⁴

(3.) Deeds bearing a clause dispensing with delivery appear also to be valid without delivery. Stair states this doctrine broadly as above.⁵ Erskine lays down the same doctrine, adding, 'These are of the nature of revocable deeds: for the granter, by continuing them in his own keeping, continues a power with himself to cancel them; but if he do not exercise that power, they become effectual upon his death.' Mr. Dickson⁶ says that deeds with the clause in question are effectual though undelivered, 'because they sufficiently mark the intention of the granter. They are of the nature of *mortis causâ* deeds retained for the purpose of cancellation if the granter chooses, but meant to be effectual if not revoked during his life.' Such deeds, while undelivered, are not entitled to receive effect in competition with deeds which have been delivered.⁷ Practically, I apprehend this exception is hardly an extension of the exception already noticed applicable to writings properly testamentary or *mortis causâ*.

(4.) Bonds or other deeds by parents to their children are valid though not delivered to the children during the granter's lifetime. So far as regards bonds by fathers to infant children, this can hardly be called an exception from the general rule, because a father is the natural custodier of such children's writings. But the same holds with respect to a bond by a mother to her daughters;⁸ and by a father to a son who had been forisfamiliaried;⁹ and to a natural child.¹⁰ On the same principle, postnuptial settlements by husbands in favour of their wives are obligatory without delivery to the wives, the husband himself being the legal custodier of his wife's writings.¹¹ A difficult question connected with this point occurred in the case of Riddel;¹² where a husband granted a deed of provision for 6000 merks to his wife in case of her survivance, conveying the remainder of his estate to her in liferent, and their children, of whom there were several in existence, in fee; the

¹ Hadden, 19th June 1668, M. 16,997; and Stark, 11th Dec. 1679, M. 17,002.

² M'Bride, 6th Jan. 1680, M. 17,002.

³ Hadden's case; and Eleis, 23d July 1669, M. 16,999.

⁴ Logan, 27th Feb. 1823, 2 Sh. 253.

⁵ Stair, i. 7. 14. (5).

⁶ Dickson on Evidence, i. 484.

⁷ Anonymous case, March 1683, M. 17,003; Stair, i. 7. 14. (8).

⁸ Hamilton, 29th June 1624, M. 4098.

⁹ Monro, 16th Dec. 1712, M. 5052.

¹⁰ Aikenhead, 25th February 1663, M. 16,994.

¹¹ Lindoris, 18th Feb. 1715, M. 6126.

¹² Riddel, 3d Jan. 1750, M. 11,577.

deed also provided 10,000 merks to his children, in case of his wife predeceasing him, payable at the marriage or majority of the children, with interest from the term of payment. The deed was put by the husband into his wife's hands apparently as soon as it was executed, and she, shortly before her death, which happened whilst her husband was still living, gave the deed to a friend, by whom it was placed on record. All the children died but one, who was married, and the 10,000 merks were found due to the husband of this one child. The question turned on the effect of the delivery to the wife, which was held to be for all concerned, Lord Kilkerran expressing much doubt.

(5.) Deeds which the granter lies under an antecedent unconditional obligation to execute are valid without delivery; for, in such circumstances, the grantee, as he had a right to demand the execution, is also entitled to compel the delivery of the deed when executed. It is not, properly speaking, in the granter's power, though in his hands. This principle was sanctioned in the case of *Cormack*;¹ where a bond and disposition in security, which a party was unconditionally bound to grant, and did grant, but kept in his hands till his bankruptcy, was thereupon used as warrant of infestment, and was held valid, notwithstanding it had not been out of the granter's hands till after his bankruptcy. The granter, however, was factor and agent for the grantees, and in that capacity the natural custodier of the bond. There were thus several grounds on which to hold that this deed was not to be dealt with as having been in the granter's hands undelivered at the time of his bankruptcy.

(6.) Mutual obligations or contracts, subscribed by two or more parties for their interests, and representing transactions completed on both sides, require no act of delivery.² Such deeds are common rights to the several contractors, and in fact are delivered deeds. On this principle, it was at one time held that a decreet-arbitral, subscribed by the arbiters, but not delivered to the parties, had full force; the Court regarding the arbiter or his clerk as depositaries in keeping it for behoof of the parties-submitters. But the law on that point has been altered, and it is now settled that decreets-arbitral, until delivered to the parties, or placed, with a view to such delivery, so as to be out of the power of the arbiters, or put on record, express merely the arbiters' intentions for the time, and settle nothing. The true question is, whether the arbiters have irrevocably issued their judgment in the cause.³ Lord Braxfield, in *Robertson's case*, said, 'an arbiter does nothing effectual until he either delivers or registers his decree.'⁴ Lord Lyndhurst speaks of the undelivered decreet-arbitral in *Macnair's case* as only 'intended to be a decreet-arbitral when completed by delivery, or by being entered on record.'

The delivery of an interim decreet-arbitral to the clerk, during the

¹ *Cormack*, 8th July 1829, 7 Sh. 868.

² *Crawford*, 29th June 1625, M. 12,304.

³ *Robertson*, 20th Jan. 1783, M. 653.

⁴ See also *Macnair*, 31st May 1827, 5 Sh. 735; affirmed, 8th July 1831, 5 Wil. & Sh. 305.

subsistence of the submission, and whilst the arbiters' powers, including their power to recal the decret, were in full force, was held in Robertson's case not equivalent to delivery to the parties. But in a later case,¹ Lord Cowan, Ordinary, in discussing a question (which did not come before the Inner House) relative to the delivery of a decret-arbitral, draws a distinction between simply placing the decret in the hands of the clerk during the subsistence of the submission, and when it remains in the arbiters' power, and leaving it with the clerk till after the submission and the arbiters' powers have expired. His Lordship, after saying that, during the subsistence of the submission, the arbiter may recal any decret which has not been delivered to the parties, or put on record, proceeds thus: 'The question, however, assumes quite a different aspect when, at the termination of the time limited for the endurance of the arbiter's powers, a decret-arbitral, duly executed, is found in the hands of the clerk of the submission, or is in course of being placed in his hands. In that state of matters it is considered that the arbiter has no longer any control over the deed; that the deed must be viewed as placed in the custody of the clerk, for behoof of the parties interested; and that a valid decret-arbitral has been pronounced, although actual delivery of it to the parties, or its registration, may not take place till after the expiry of the time limited for the endurance of the submission.' The same distinction is noticed by Lord Ivory in his edition of Erskine;² and the principle stated by their Lordships appears to have received effect in the case of M'Quaker.³

EQUIVALENTS
TO DELIVERY.

In connexion with the general subject of the delivery of deeds, I have now to notice what are equivalents to delivery.

(1.) Diligence for payment of a debt, used in name of an assignee to the debt, imports delivery of the assignation in his favour. It was so found, although the diligence was done by the cedent's orders, and the assignation and the other vouchers of debt were all retained in his hands.⁴ As a general rule, the same effect will follow the passing and recording of sasine on a conveyance, though the conveyance is retained in the granter's hands.⁵ Now, of course, registration,—as equivalent to infestment,—or registration for publication, would have the same effect as passing and recording sasine. The question, whether recording a deed in the Register of Sasines would, in all cases, be equivalent to delivery, was raised by Lords Deas and Ardmillan in the case of Burnet.⁶ Both say that recording is not, in all circumstances, such equivalent.

Intimation of an assignation would also be held equivalent to delivery thereof;⁷ and when a party, who had money due to him, obtained a bond, not in favour of himself, but of one who was his creditor, and the

¹ Earl of Hopetoun, 6th March 1856, 18 D. 739.

² Ivory's Erskine, p. 638, note 99.

³ M'Quaker, 19th March 1859, 21 D. 794.

⁴ Dick, 21st Jan. 1677, M. 6548.

⁵ Bruce, 2d June 1675, M. 11,185.

⁶ Burnet, 26th March 1864, 2 Macph. 929.

⁷ M'Lurg, 26th Feb. 1680, M. 845.

bond was intended as a payment to the creditor to account of his debt, such bond was held effectual, though not delivered to the grantee, but only to his debtor; and the grantee was found entitled to compel delivery to him.¹

The registration of a deed for preservation merely is different, in point of legal effect, from the registration last referred to. In the case of *Leckie*,² a disposition was granted by a father to his youngest daughter, and her husband, and their son, under reservation of the granter's liferent, of certain heritable subjects, and of all his moveables as at his death. The disposition contained a clause dispensing with the delivery, but it was registered by the granter for preservation. The granter having afterwards executed a disposition of the same subjects, heritable and moveable, in favour of his three daughters equally, the youngest daughter brought a reduction of the latter deed, on the ground that the former, being put on record, was thence to be held delivered and irrevocable. The Court found that, in so far as regarded the moveables, the conveyance of which was of all his moveables as at his death, the first deed could operate no transference till the granter's death; to which extent, therefore, they held it as revoked by the later deed. But, with regard to the heritage, they found that the registration of the first deed was equivalent to delivery, and they, therefore, reduced the latter deed, *quoad* the heritage. This case, as reported, does not explain the principles on which the deed was held delivered and irrevocable as to the heritable estate more than as to the moveable; but the case shows registration for preservation not to be, *per se*, equivalent to delivery. The same will appear from the case of *Downie*,³ where the deed had been registered for preservation. The Court held it delivered; but, in doing so, they proceeded on the combined effect of numerous facts and circumstances, the registration being only one of these. There is, I apprehend, no general rule as to the effect of registration for preservation on this question of delivery. In some cases it may be conclusive, and in others of no importance. That there must be delivery, is a point of law; but whether there has been delivery or not is a matter of fact requiring to be proved, and which a variety of circumstances may affect.

Judicial ratification by a wife, of a deed to which she is a party, does not infer delivery; it is matter of notoriety that deeds are so ratified with a view to delivery in a completed state, and not as the result of delivery.⁴

As the granter of a voluntary deed cannot be bound by it till he place it out of his own power, by delivery or its equivalent, neither can the grantee be bound till he accept of it, especially if it expresses burdens

¹ *Bain*, 27th Feb. 1678, M. 9128-9130.

² *Leckie*, 22d Nov. 1776, M. 11,581, and App. Presumption, No. 1.

³ *Downie*, 5th Dec. 1843, 6 D. 180.

⁴ *Bathgate*, Jan. 1685, M. 17,004.

and conditions intended to affect him. The bare receiving it from the grantor ought not, in reasonable construction, to infer acceptance. The natural presumption is, especially if there are burdens and qualifications, that when it is placed in the grantee's hands he is to be left suitable opportunity to consider whether he will accept or repudiate.¹ The fact of acceptance, if disputed, will be a subject for proof *prout de jure*, just as any other fact would be. It will be sufficiently proved by the grantee's acting upon the deed—taking the benefit of its provisions in his favour, placing it upon record, or otherwise treating it as his deed. If, however, it is of importance to prove acceptance in any case, a regular written declaration of acceptance should be obtained from the grantee.

In a recent case, the institute in an entail, executed by testamentary trustees in pursuance of their trust, opposed a petition for recording the entail at the instance of the trustees, as he had not accepted the conveyance in his favour contained in the entail, and did not mean to accept or take benefit under it. But as he did not aver that any positive injury would result to himself from recording the deed, and there were other parties interested in it, whether he accepted or not, the Court held that they could not refuse to record.² Of course, if it was open to the institute to accept the conveyance or not—a question not discussed in the above case—and, if he did not accept, the deed of entail could not operate as a conveyance to him.

¹ Erskine, iii. 2. 45.

² Gilmour's Trustees, 6th Dec. 1856, 19 D. 134.

TITLE IV.

INCAPACITATED PERSONS.

CHAPTER I

WE have now considered the rules of law applicable to the authentication of deeds, and have likewise seen that delivery by the granter, and acceptance by the grantee, are necessary to the completion of deeds in general, in evidence of that consent and completed purpose of the parties on which deeds must proceed. We shall, by and bye, have to consider those exceptional cases in which consent is expressed or proved otherwise than by deeds authenticated according to the legal solemnities; and also those cases in which consent not being truly given, though apparently testified in accordance with all the legal solemnities, the deed is open to be set aside on the ground of essential error, fraud, or force and fear. What is required, you will observe, is consent; and the law, whilst, on the one hand, not restricting parties to any exclusive mode or form of giving the necessary evidence of real consent, on the other hand, will not be satisfied with apparent evidence, however formal, if there is no real consent. But, before proceeding to these points, it will be convenient here to consider the case of those parties who, from natural or other causes, are held not competent to form that deliberate and free judgment, which the law requires in order to an effectual consent.

I will notice, *first*, Incapacity from Imperfect Age.¹

Parties are said to be under age, or in nonage, until they arrive at majority—that is, have completed their twenty-first year—and all under that age are, in ordinary language, described as in minority. Strictly speaking, however, the period up to twenty-one years of age is divided into pupillarity, extending in males to fourteen, and in females to twelve

INCAPACITY
FROM IMPER-
FECT AGE.

¹ Erskine, i. 7; Mensies' Lectures, p. Personal Relations, vol. ii. p. 61, *et* 29, *et seq.*; Fraser on the Domestic and *seq.*

years of age; and minority, from these respective ages, to twenty-one, both as regards males and females.¹ During pupillarity, the persons, as well as the affairs of children, are under the charge and management of tutors. Parties in minority are masters of their own persons, but, as to their affairs, require the consent of their curators, if they have such; and it may here be well to state that the father, if subject to no incapacity, is *ex lege*, and without any appointment, the tutor and curator, or, as he is generally called, administrator-in-law, to his children, so long as they are under age. Failing him by death, the offices fall to any persons whom he may have appointed to fill them, and who may accept; failing such appointment by him, or the persons whom he has named, the nearest male relation by the father's side, of the age of twenty-five years complete, can be served before a jury upon a brieve issued from the Chancery, as tutor-at-law; at all events if he is resident within the jurisdiction of the Court of Session. Failing such party, the Court of Session, as in place of the Exchequer Court, will issue an appointment to a tutor-dative; or the Court of Session will appoint a factor *loco tutoris*; or, if only the interest in a particular process depending before the Court is concerned, a tutor *ad litem*, for pupils. The minor, on the other hand, can choose curators for himself; or, in immediate connexion with judicial proceedings, and especially if his father has an opposite interest in such proceedings, the Court will appoint a curator *ad litem* to him. The Court formerly declined to name curators *bonis* for minors, because minors could choose for themselves; but, on a recent application for such an appointment, and after appointing a curator *ad litem* to inquire and report, the Court appointed the same party to be curator *bonis* for minors, and factor *loco tutoris* for pupils, all members of the same family, and having apparently similar interests in a common subject.² Similar appointments have since been made. The Court will not name more than one person to be factor *loco tutoris*,³ and they will not appoint a female to that office.⁴

It has been held no objection to a person being tutor-at-law that he does not reside in Scotland.⁵ That office is assumed as matter of legal right, and constituted by service before a jury, not by appointment of the Court. But where the tutor-at-law was not only domiciled in England, but was partner of a company indebted to the pupils, the Court reduced his service.⁶ The Court were not unanimous in holding it an imperative rule that absence from this country constituted an *ipso facto* disqualification;⁷ and, in general, the Court will not appoint as tutor-dative the party who can serve as tutor-at-law, though, in special circumstances, they will do so.⁸ In another case, the Court of Exchequer appointed an Englishman to be tutor-dative to a Scotch pupil, and, on this circum-

¹ Craig, ii. 20. 17.

² Davies, 21st Jan. 1857, 19 D. 286.

³ Brown, 1st Feb. 1815, F. C.

⁴ Horn, 6th March 1845, and Fraser, same date, 17 Jurist, 291.

⁵ Bell, 10th March 1784, M. 16,374; Rob, 22d Dec. 1814, F. C.

⁶ Hadden, 27th Feb. 1822, 1 Sh. 357.

⁷ Ramsay, 28th July 1688, M. 16,313.

⁸ Reid, 2d March 1860, 22 D. 932.

stance coming before the Court of Session, the Lord Justice-Clerk Hope observed, that no tutory should be conferred upon a person whose domicile does not make him amenable to the jurisdiction of the Court of Session.¹ But more recently, the Court, considering the frequency of connexions by marriage arising between parties having English and Scotch domiciles, and the consequent importance of allowing minors in Scotland to choose curators domiciled in England, approved of the nomination by a Scotch minor of his uncle, by the mother's side, as his curator, though the uncle was domiciled in England, on condition that the curator should bind himself to be subject to the jurisdiction of the Courts of Scotland in matters connected with his office.²

The father, and tutors and curators named by him, are not required to find caution for their intromissions. Neither do tutors or curators *ad litem* find caution, because they have merely to act in judicial proceedings, and can have no intromissions. All other tutors and curators, and factors *loco tutoris*, must give caution before they can enter on the administration of their offices; but the Court will now accept the bond of a Guarantee Association, unlimited as to liability, for the tutor or factor, in place of an ordinary bond by an individual cautioner.³ In Burnett's case, the association was formed with unlimited liability on the part of its members or partners, for fulfilment of all its obligations. It would appear that a bond by a company formed with limited liability would not be accepted.⁴

As a general rule, no one has full power of acting for himself before he reaches majority; but there is an essential distinction between the legal position of persons in pupillarity and those in minority. Pupils cannot, under any circumstances, validly contract, or grant a deed, because they are regarded as absolutely incapable of giving that deliberate consent which is essential to a contract or deed.⁵ This is a rule to which there is no exception. Such deeds as are required on behalf of pupils can be granted only by their tutors, or by factors *loco tutoris* where there are no tutors. Minors, on the other hand, though they are rightly considered as wanting that maturity of judgment which is necessary for their protection in the transaction of business, are not, by the law of Scotland, held incapable of deliberating. On the contrary, although practically their powers are limited, their acts and deeds are not null if they have no curators; and even if they have curators, in which case, generally speaking, the consent of the curators is necessary in order to validate the minors' deeds, yet, in the granting of deeds the minors are the principal parties, and their curators are merely consenters along with them.

The powers of tutors arise partly by Statute, but chiefly at common POWERS OF
TUTORS.

¹ Earl Craven, 25th June 1853, 15 D. 781.

² Lord Macdonald, 11th June 1864, 2 Macph. 1194.

³ Burnett, 8th July 1859, 21 D. 1197.

⁴ Sim, 5th Dec. 1863, 2 Macph. 205.

⁵ Erskine, i. 7. 1; Bruce, 24th Jan. 1577, M. 8979.

law; aided, in cases of emergency or necessity, by the exercise of the *nobile officium* of the Court of Session, in conferring extraordinary powers on them. The common law powers vary, in some respects, according as the tutor is the pupil's father, or is named by the father, or appointed by law, or by the Court. The powers of the father, or of his nominees, are the largest. It may be laid down, generally, that the father, and all tutors, curators *bonis*, and factors *loco tutoris*, holding appointments conceived in the usual terms, can perform acts of ordinary and necessary administration, having for their object the preservation and management of their ward's estate, and the fulfilment of obligations due and incumbent on him by law.

Tutors-testamentary can make up titles in the person of their ward to his estate, simply in virtue of their office,¹ and the Court will, under ordinary circumstances, grant such power to any tutor or factor *loco tutoris*,² though it is by no means clear that special powers are required by such factors or tutors for the above purpose. The titles, when made up, ought to be conceived in favour of the pupil, not of the factor or tutor.³

All tutors have further full power to levy the pupil's rents and interests, and to grant receipts therefor; to appoint factors and stewards under them, when the case requires,—from whom, however, they ought to require caution; to remove tenants on the expiry of their leases, or when removal ought to be insisted on as an act of ordinary administration; to grant new leases, which, however, if granted without special power, will cease with the expiry of the tutor's office;⁴ to enter the heirs and singular successors of the pupil's vassals—the granting to such parties of the writs required for renewal of the last investiture being a legal obligation incumbent on the pupil, though special power to do so is frequently asked for of the Court; and generally the tutors can grant such deeds as the pupil, if he were of age, might be compelled by law to execute. It was so decided, as to the alienation of heritage by granting a feu-right which the deceased ancestor, whom the pupil represented as his heir, had become bound to execute.⁵ When, however, as in that case, the deed is one which the tutor could not have granted, except in fulfilment of an obligation arising under a prior deed, and is not merely *ex lege* incumbent on the pupil, the conveyancer ought to preserve evidence of the obligation, as part of the title. Tutors can also accept payment of debts, the term of payment of which has come, and which are to be paid in full, when required by the debtor, and thereupon grant discharges or assignations, because the pupil might be compelled to do so, and the deed is not voluntary but necessary;⁶ and they can and undoubtedly ought to

¹ Graham, 21st Jan. 1852, 14 D. 357.

² Baird, 13th Jan. 1741, M. 16,346; Crichton, 13th Feb. 1857, 19 D. 429; and Waddell, 19th Feb. 1851, 13 D. 739.

³ Kennedy, 6th June 1823, 2 Sh. 375; Reid, 23d June 1830, 8 Sh. 960.

⁴ A. against Marquis of Huntly, 3d Jan. 1672, M. 16,285.

⁵ Earl of Aberdeen, tutor-dative to Marquis of Abercorn, 26th Nov. 1823, 2 Sh. 527.

⁶ Graham, 31st Jan. 1735, M. 16,339.

require, and, if necessary, sue for payment of debts, or fulfilment of obligations, on behalf of their pupils, at least as promptly as they would do on their own account, if the debts and obligations were due to themselves.

The question whether a father, as administrator-in-law for a pupil child, could receive payment and grant a valid discharge of a debt due to his child, was recently tried; and there being no averment that the father was insolvent, or in doubtful circumstances or failing credit, his right was considered clear.¹

Tutors, and others acting for incapacitated persons, have long been in use to make application to the Court, in the exercise of its *nobile officium*, to extend and enlarge their powers, in cases of emergency or necessity; and the principles on which the Court hold themselves entitled to act, and on which they are disposed to grant or to refuse their authority, will be found detailed in a variety of cases.² The cases referred to, though immediately applicable to the estates of lunatics, contain the general rules applicable to the granting of special powers to those acting for incapacitated persons. Somerville's case exhibits the unanimous opinion of the whole Court, both as regards the Court's powers, and the circumstances in which they ought to be exercised. These principles have been acted on both before and since that case was under consideration. And the authority of the Court, in respect to the granting of special powers, has been confirmed and enlarged by the Pupils Protection Act,³ which, by sect. 7, authorizes the Court to sanction the granting of abatement of rent; to renew or grant a lease for a period of years; to authorize draining, the erection of buildings or fences, or otherwise improving the estate in a manner not coming within the ordinary course of factorial management; and generally, in all other matters in which special powers were, according to the then existing practice, in use to be granted by the Court.

For borrowing money on the security of the ward's estate, special power is clearly necessary. But in cases of practical necessity the Court will grant power to tutors and to factors *loco tutoris* to borrow on such security; in particular they have done so for repairs on the property, and necessary payments on account of the pupil,⁴ and in order to clear off debts for which adjudications were about to be led;⁵ and tutors-testamentary were authorized to burden the expected succession of their ward, who was in a state of destitution, in consideration of a present advance to clear off debt, and an annuity required for maintenance and education during pupillarity.⁶

Tutors can sell moveables belonging to the pupil, but they cannot

¹ Cattaniach, 2d July 1858, 20 D. 1206.

² See, as leading cases, Somerville's Factor, 6th Feb. 1836, 14 Sh. 451: and Macnochie, 3d Feb. 1857, 19 D. 366.

³ 12 & 13 Vict. c. 51.

⁴ Crawford, 6th July 1839, 1 D. 1183.

⁵ Wood, 13th Feb. 1857, 19 D. 428.

⁶ Buchan, 16th Dec. 1837, 16 Sh. 238; 7th March 1839, 1 D. 637.

without special power sell the pupil's heritage; and, as a general rule, the Court will not authorize such sale, except on the ground of 'necessity.'¹ In Waddell's case the Court refused power to a tutor to grant a lease of a colliery for fourteen years, and to feu ground for workmen's houses.² Nor would their granting power, even to testamentary tutors, to sell heritage, except in a case of necessity, be sufficient to support the sale of the pupil's heritage. In Vere's case,³ the Court had interposed its authority to the sale of a pupil's heritage, which they had declared unchallengeable on the head of minority and lesion, or any other ground arising from the state of minority; but on the pupil's coming of age the sale was reduced at his instance, the reporter stating as the reason that the sale had been 'at the best only an object of apparent advantage, but not of urgent 'necessity, to the pupil's affairs.' The necessity on which a sale can be authorized may, however, assume various forms, and, in particular, may arise from the nature of the subject. Thus, in the case of Plummer⁴ the Court authorized tutors, though their pupil's estate was free of debt, to sell a chemical laboratory, which had devolved to the pupil, and could not be used for his profit. The ground on which the sale was authorized was described as 'utility,' but Lord Ivory⁵ says, 'This case is, perhaps, 'not inconsistent with the others above quoted; for although there was 'there no necessity for the sale, arising out of the *egestas* of the pupil, the 'nature of the subject was such that its value would otherwise have been 'almost entirely lost.' The same principle has been acted on in other cases of later date.⁶

Tutors, and factors *loco tutoris*, have been in use to make application to the Court for special powers to grant leases, and, with reference thereto, to expend money in farm buildings or improvements, more than with reference to any other acts of administration; it being of great importance to pupils that their tenants should have the certainty of a definite term of endurance of their possessions. Every such application is to be judged of according to its own circumstances. I think it unnecessary to refer you to more than two of the cases in which such power was asked for. In the one, Morison⁷ (which contains a list of the authorities or precedents for such powers), power to grant nineteen years' leases of arable farms was, though not without partial hesitation, given to tutors-nominate; but in the other, Fraser,⁸ the Court, by a majority, and though unanimous as to their competency, refused to grant to a tutor-at-law power to enter into leases to endure beyond the term of his office, because a case of necessity had not been made out; and apparently from the apprehension that, by entertaining such applications, they might become too largely the administrators of lands held by pupils.

¹ Finlayson, 22 Dec. 1810, F.C.; Waddell, 19th Feb. 1851, 13 D. 739.

² Boyle, 19th Feb. 1853, 15 D. 420. See in particular the opinion of Lord Curriehill.

³ Vere, 29th Feb. 1804, M. 16,389.

⁴ Plummer, 8th March 1757, M. 16,358.

⁵ Ivory's Erskine, p. 173, Note 209.

⁶ Kirkland, 6th June 1848, 10 D. 1232; and Muller, 11th Feb. 1854, 16 D. 536.

⁷ Morison, 20th Feb. 1857, 19 D. 493.

⁸ Fraser, 9th June 1857, 19 D. 801.

The offices of tutor and curator are, in all cases, gratuitous. Tutors or curators can never obtain remuneration for time or services. The utmost they are entitled to is to be reimbursed of their outlay; and, where a party, having no appointment, assumes the management of the estate of a minor, he must account with the minor as a curator would be required to do. It was so found in the case of a party who was husband of the minor's aunt, and who, after acting for a time without appointment, ultimately obtained a regular appointment as curator.¹ Curators *bonis* and factors *loco tutoris* are entitled to remuneration, unless they are the parties who might be served tutors-at-law to the minors; in which case they must act gratuitously. All such tutors and curators are bound to denude in favour of the ward, *simpliciter*, on his coming of age, of such property belonging to him as may be vested in them.² And their powers expire with their office. The discharge of a debt, granted to the debtor in name of the tutors of the creditor, after their office of tutory had expired, was found null.³

As a general rule, a deed, *inter vivos*, by a minor having curators, is MINORS. valid, when granted with their consent, and is null when without their consent; but provisions in favour of wives or children, by marriage-contracts, entered into by minors without consent of their curators, have repeatedly been sustained, so far as lesion was not proved.⁴

It is also a general rule that, so far as the consideration given for deeds by minors was *in rem versum* of the minors, such deeds will be sustained, even though without the curator's consent. And there are other cases in which the objection, founded on the want of the curator's consent, is not altogether fatal.⁵ For example, a minor having a curator may, by himself alone, validly enter into a simple contract of service as a workman.⁶ A minor conducting business may be bound by granting bills in the ordinary course of his trade, though without consent of his curators.⁷ But speculating in the shares of joint-stock companies, though to a large amount, is not entitled to protection as a business transaction.⁸ And the consent of the curator will not protect an obligation undertaken for behoof of the curator himself.⁹

But though, as a general rule, deeds by a minor who has no curators are legally valid, it is competent for the granter, after attaining majority, to reduce them if he can establish lesion; that is, that he was prejudiced by granting them; and, practically, minors without curators can compel no one to transact with them, on the footing of their having power to grant valid deeds or obligations. This principle was established in an

¹ Rutherglen, 25th Jan. 1860, 32 Jurist, 202.

² Kennedy, previously referred to, 6th June 1823, 2 Sh. 375.

³ Lockhart, 15th December 1826, 5 Sh. 136; affirmed 24th June 1829, 3 Wil. & Sh. 481.

⁴ Davidson, 4th July 1632, M. 8988; Bruce, 23d Dec. 1854, 17 D. 265.

⁵ See the opinions of the Court at advising Bruce's case.

⁶ Campbell, 13th Feb. 1827, 5 Sh. 335.

⁷ Campbell, 24th Jan. 1822, 1 Sh. 266; and 29th Nov. 1826, 5 Sh. 54.

⁸ Dennistoun, 31st Jan. 1850, 12 D. 613.

⁹ MacMichael, 17th Dec. 1840, 3 D. 279; Manuel, 15th Jan. 1853, 15 D. 284; see also M'Gibbon, 5th March 1852, 14 D. 605.

early case, where the Court refused to compel a debtor to pay the principal sum of his debt, on a simple discharge by a minor having no curator.¹ In practice no such thing is known as payment to a minor on such a discharge. A minor, without curators, being patron of a vacant church, is, however, entitled to present a minister to fill the vacancy.² Whether, if he has curators, he can present without their consent, appears to be a disputed point.

A minor having curators can, without their consent, make a testament, to take effect after his death, of all the moveable estate which he holds subject to no prohibition to alter the right of succession.³ But where a party, who held his moveables under an implied prohibition to alter before majority or marriage, died in minority and unmarried, his testament was set aside.⁴ The minor cannot, even with consent of his curators, make a *mortis causâ* disposition of his heritable estate.⁵

In the case of minors, the rule applicable to mutual contracts in general, that unless both parties are bound, neither is so, does not hold; for, although contracts entered into by minors having curators, without their consent, are open to reduction, on behalf of, or at the instance of, the minors, there is no reciprocal right of reduction at the instance of the other parties; and the contracts, if not opened up by the minors, will be obligatory on the other parties, who in that case can be compelled to perform their parts. Of course, if the minor sets aside the contract, the other party will be free of his obligations under it.

Deeds by curators applicable to the minors' estate, without the concurrence of the minors, are null. The curator is not the party to transact with such estate. His position is only to give, or withhold, his consent to deeds by the minor.⁶

There are several peculiarities, in connexion with judicial proceedings at the instance of, or against, pupils or minors, which it is important to keep in view. For example, actions may be brought into Court in name of a pupil having no tutors. In such cases, the Court, after the case comes before them, will appoint a tutor *ad litem*; that is, a party to take charge of the interest of the pupil in the lawsuit or cause. And diligence may be validly used in name of the pupil before the tutor's appointment.⁷ The same rule of law which supports the action will support the diligence also. Actions brought against pupils and minors must be served upon them as defenders, in like manner as if they were of full age. It is also necessary, in the general case, to bring the action against their tutors and curators, if they any have, for their interest; and to cite such tutors and curators edictally at the market cross of the head burgh of the shire in which the minor resides. If they have no tutors

¹ Kirkman, 1st Aug. 1782, M. 8977.

² Bankton, ii. 8.100; Connell on Parishes, p. 520.

³ Stevenson, 30th Nov. 1860, M. 8949; Craick, 22d June 1739, M. 16,342.

⁴ Waddell, 6th Jan. 1739, M. 8965.

⁵ Marquis of Clydesdale, 26th Jan. 1726, M. 1265 & 8964; Cunynghame, 8th March 1797, M. 8966.

⁶ M'Intosh, 9th Jan. 1675, M. 11,239; Earl of Bute, Dec. 1725, M. 16,338.

⁷ Johnston, 16th Jan. 1640, M. 16,346.

or curators, it is essential that a tutor or curator *ad litem* be appointed to them when the case comes into Court. Disregard of this rule will authorize reduction of the proceedings.¹ Recently an action was held incompetently brought against a pupil whose tutors and curators, if he any had, were not called, and it was held that the objection could not be remedied by the appointment of a tutor *ad litem*, even when appearance was made for the pupil.² An effectual decret *in foro* cannot be pronounced against a pupil, unless his tutors appear and plead in the character of tutors.³ And a decret obtained in absence against a minor who had no curator, and to whom no curator *ad litem* had been appointed, was set aside.⁴ But when a petition for authority to sell lands, under the Entail Amendment Act of 1848, was served on a pupil heir, and on all his tutors personally, it was held not necessary in that case also to cite his tutors edictally.⁵

As to the importance of this point of citation, the case of Wilkie⁶ is very instructive. Diligence was there done on a bill granted by two parties for their food and lodging; one of the parties was under twenty-one, and had curators, who did not concur in the bill; the other was of full age. The latter paid his half of the bill; the minor refused to pay. The minor's curators were overlooked in the diligence and execution used against the minor, and the Court, though they found the minor liable in payment of the remaining half of the bill for his food and lodging, suspended the charge or diligence against him, in respect of the omission to cite the curators.

Parties have a right of restitution, against deeds granted to their prejudice, during their pupillarity or minority, extending over forty years from the day when they attain majority, in cases of original nullity; as, for example, in the case of deeds by pupils, or by minors having curators, without their consent; or with such consent, when in favour of the curator himself.⁷ The objection, however, that a tutor cannot be *actor in rem suam* cannot be pleaded by third parties.⁸ Parties have the like right of restitution in all other cases, even when, having curators, they and their curators have jointly granted the deeds sought to be set aside; but, in this last case, only until the expiry of four years after majority, called the *quadriennium utile*; that is, at any time before attaining twenty-five years complete. This right is not cut off by a slight act of homologation or approval occurring very recently after majority;⁹ more especially when there is fraud involved.¹⁰ But if any consideration was given for the deed sought to be set aside, the restitution extends only so far as such consideration has not been *in rem versum* of the pupil or

¹ Agnew, 31st July 1822, 1 Sh. App. 333.

² Thomson's Trustees, 14th Nov. 1863, 2 Macph. 114.

³ Craven, 9th March 1854, 16 D. 811.

⁴ Bannatine, 14th Dec. 1814, F. C.

⁵ Erskine, 6th Feb. 1852, 14 D. 766.

⁶ Wilkie, 28th Feb. 1834, 12 Sh. 506.

⁷ See opinion of Lord Rutherford in Manuel, 15 Jan. 1853, 15 D. 284, and authorities there quoted.

⁸ Downie, 31st Jan. 1815, F. C.

⁹ Melvil, 5th July 1782, M. 8998.

¹⁰ Leiper, 9th July 1822, 1 Sh. 552.

minor.¹ The decisions suggest the importance of preserving evidence of the beneficial employment of money advanced on account of minors.

When tutors or curators testamentary (who are not subject to the provisions of the Pupils Protection Act of 1849) desire to obtain special powers, they can apply to the Junior Lord Ordinary, under the Court of Session Act,² as they formerly could apply to the Court by summary petition. The petition will be remitted to a competent party for his report, and further disposed of as provided by the Act.³ When special power is wanted by a factor *loco tutoris*, or other party, subject to the provisions of the Pupils Protection Act, he can either apply to the Lord Ordinary, by summary petition, when the matter will be disposed of as in the case of the petition from a testamentary tutor; or, he can lodge with the Accountant of the Court of Session (appointed in terms of sect. 9 of the Pupils Protection Act) a statement of what is wanted, with the particular reasons calling for the Court's interposition. On this the Accountant gives his opinion, which is brought, with the statement or application, before the Lord Ordinary, and further disposed of, as in the other cases above specified. Formerly, the Court alone could grant the special powers; but that rule is now altered by the Court of Session Act. As regards obtaining special powers, however, tutors or curators testamentary are not in so favourable a position as other tutors. They find no caution; they have the highest powers known to the common law as belonging to tutors; and the Court have indicated that testamentary tutors ought to be left to exercise their large powers on their own responsibility, except in matters of great necessity. Other guardians are, in most instances, officers of Court. They all find caution before entering on their office; and the Court, to whose orders they are at all times amenable in a summary way, are less jealous of intrusting extraordinary powers to them than to tutors testamentary, over whom, when they get their powers, the Court have no direct control. But, even in the case of tutors and curators not testamentary, the Court will always require a strong and clear case before granting special powers. And, except as enlarged by the Court, or by Statute, the powers of tutors and curators are often found inadequate to the beneficial management of their ward's estate. They cannot exceed their powers, without the risk of question and claims on the part of their ward, after he attains majority; or, in case of his death, at the instance of the heirs succeeding to his estate. The latter difficulty may be met, in a case of urgency, and where confidence is reposed in the guardians, by an agreement to ratify their general management on the part of the nearest relations, as far as they shall be interested. But the power of objection on the part of the ward does not seem excluded, except when special powers are given by the Court under the sanction of the Pupils Protection Act, which has certainly conferred very great benefits on parties under its scope.

¹ Anderson, 15th Nov. 1832, 11 Sh. 10;
Harkness, 20th June 1833, 11 Sh. 760.

² 20 & 21 Vict. c. 56, s. 4.

³ Ss. 5, 6.

CHAPTER II.

I HAVE next to direct your attention to the incapacity arising from unsoundness of mind. UN SOUNDNESS
OF MIND.

In cases of insanity or idiocy, the party may be cognosced before the Judge Ordinary of the place of his residence, and a jury of fifteen men, summoned in virtue of a short writ (technically called a brieve) issued from the Chancery in the Queen's name, directed to the Judge Ordinary, desiring him to convene a jury for making the necessary inquiries, and to report or return their answer or verdict. Where these proceedings take place, the party and his affairs are placed under the charge of a tutor or guardian. But, without the formal process of cognoscing, the affairs of a person incapacitated through insanity or idiocy may be put, by the Court of Session, summarily under guardianship, on an application to the Court in the form of petition, accompanied by medical certificates of his mental incapacity. In circumstances where such proceedings are competent, the party is wholly incapacitated from granting deeds (except on re-convalescence, or during lucid intervals); and, subject to that exception, all deeds on his behalf require to be granted by his tutor or judicial factor, precisely as in the case of tutor and pupil.

In cases of cognoscing, the jury who are to try the question of the party's incapacity are required, by the Act 1475, cap. 66, to ascertain and fix the date as at which the incapacity commenced; the Act declaring of no avail all alienations made by the party after such date, as well as those made after serving the brieve,—that is, after they have tried, and returned their verdict upon, the question of incapacity. This verdict, however, to which the party cognosced is the only contradictor, only raises a presumption against deeds granted subsequently to the date so fixed by the jury. Before such deeds can be actually set aside, an action of reduction must be brought against the parties interested under the deeds, in order to give them an opportunity of offering any competent defence. The verdict of the jury merely reverses the legal presumption, making it against, as in an ordinary case it would be in favour of, the deed.¹

¹ Ivory's Erskine, p. 200, Note 241; Towart, 16th May 1817, 5 Dow's App. 231.

In cases of summary application to the Court, there is no cognition before a jury. Two medical men are required to certify, on soul and conscience, that the party is unfit; but, as in cognoscing it is indispensable that the party shall be personally before the jury, so in the case of summary application, the petition for appointment of a curator or factor has to be served on the party personally, in presence of the Sheriff or his Substitute.¹ This proceeding—that is, the appointment on summary application—has no retrospective effect as affecting previous deeds. When, however, there are voidable deeds, previously granted, they can be set aside by action of reduction, equally as in a case of cognoscing. But it is not necessary, in order to set aside a deed, to prove absolute incapacity in the granter as at the time of granting the deed. There is a great variety of circumstances which, of themselves or in combination, may be sufficient in certain cases to infer reduction of a deed. The want of capacity may be general, amounting to such a state of unsoundness of mind as to disqualify from giving a clear and distinct consent, whereupon reduction will follow of course.² Or it may have reference only to a particular deed. Thus, the Court have reduced a testamentary deed of a complicated nature, made by a person who was generally thought by the Judges to be of sufficient disposing mind to have made a simple deed.³ In Watson's case, the maker of a deed which operated the settlement of her affairs, and which excluded power of revocation, was found by a jury on a first trial to be in such a state of mind as to be capable of disposing of her estate and effects; but the Court thought inquiry necessary as to her capacity to understand and make the particular deed under reduction; and, upon a second trial, the jury found that she was not in such a state of mind as to enable her to judge correctly with regard to the effect of that particular deed, as excluding her power of revocation, and that the deed was not her free and voluntary act. The deed was accordingly reduced. This subject is adverted to by the Lord Justice-Clerk Inglis, in the case of Morrison.⁴ Moreover, where there is evidence of facility and lesion, it is not always necessary to prove moral fraud, or that any specific acts of circumvention shall be established. Generally speaking, facility and lesion are attended with both moral fraud and circumvention. But it is enough if, in the whole circumstances of the party granting the deed, there was used persuasion which he was not in a condition to resist.⁵ On the other hand, if the primary and essential purpose of the deed be well understood by the granter, and in conformity with his known will, want of intelligence on his part as to a secondary purpose was found, in a special case, not to authorize the reduction of the whole deed.⁶ There, a testamentary writing was sustained, by which a party in very advanced

¹ Scott, 7th Feb. 1855, 17 D. 362.

² Christie, 13th Feb. 1700, M. 6283.

³ Gillespie, 11th Feb. 1817, F. C.; see also Watson, 18th Nov. 1825, 4 Sh. 200; affirmed, 20th June 1827, 2 Wil. & Sh. 648.

⁴ Morrison, 27th Feb. 1862, 24 D. 625.

⁵ Clunie, 14th Nov. 1854, 17 D. 15.

⁶ Scott, 17th Nov. 1789, M. 4964; affirmed 23d Feb. 1791, 3 Paton, 683.

age (he died at ninety-five), who had had repeated attacks of palsy, and whose memory had become a good deal impaired, conveyed his estate to his grandson by a natural daughter, and to the grandson's heirs and assignees, thus creating a substitution in favour of the father and other relatives of the grandson, in preference to the relatives of the testator himself. In this case, it was proved that the party did not clearly understand the legal effect of the conveyance to his grandson's heirs and assignees; but there was proof that it was his *enixa voluntas* to favour the grandson personally; and the Court could not have reduced the deed without frustrating that main and leading object. It appeared also that the deed had been executed several years before the testator's death, before the shocks of palsy, and before the impaired memory showed itself. But the case shows with what anxiety one ought to proceed in matters connected with testamentary writings; and that even as to the substitution of heirs, failing the institute (or party primarily preferred), it ought to be made clear that the testator is fully aware of the legal effect of the document he is to sign.

Questions on which a party's mental incapacity bears are very delicate, and difficult to deal with in professional practice. But beyond the general statements, and the references to authorities before given, it seems out of place for me to enter into this large subject. And it is very difficult to suggest any rules of conduct in regard to cases of the nature we are now considering, which all require to be dealt with according to their special circumstances. The cases, however, contain some instructive passages, and authorize one or two suggestions, which I think it right to bring before you.

In Clunie's case, the Lord Justice-Clerk Hope, when delivering judgment, refusing a new trial, gave the following view of the general nature of the grounds on which reduction of a particular deed or transaction, *inter vivos*, may be sought. His Lordship says, the issue sent to the Jury 'is intended to embrace any case in which, where a person has become easily imposed upon, or ready to yield his assent, whether from old age or actual disease, or the effects of the same upon the nerves,' 'another person leads him on into a highly disadvantageous bargain, to his own benefit, or that of the party for whom he is acting, and who adopts the same. The actual mode or particular acts of circumvention may not be discoverable or easily proved. But the result may demonstrate that the party was really circumvented in the sense of the issue, when he was led into the transaction under challenge; and then, the nature of that transaction, the mode in which, and the party by whom, it was carried through, and the object apparent on the face of it,' 'all bear on the jury question, whether the party had been circumvented. Under this issue, you cannot separate, as distinct and really distinguishable matters, the state of the man's mind and nerves from the way the transaction was managed. This is peculiarly the case in extreme old age, in which, though the mind may be entire, firmness to resist even persuasion may

‘be wanting to such a degree as to make undue influence amount to all the circumvention which in that case is required.’

In Gillespie’s case, where a complicated deed of settlement was under reduction, it was observed on the Bench as objectionable that the draft was prepared, extended, and signed all on one day; whereas it should have been left with the party, who was very infirm, for his deliberate perusal. Any undue haste, in a matter so solemn as the settlement of a person’s worldly affairs, ought to be anxiously avoided, and the utmost care should be taken to place beyond all doubt that the parties have time to understand, and that they do understand, the import of their deeds, and approve of the deeds before they subscribe. Where there is doubt on the point of capacity, it is best to let matters stand, and do nothing; and it may often be advisable for the agent to take the medical attendant along with him, and not to allow the execution of the deed unless the party’s capacity is duly certified. The medical man should, where it can be so arranged, be made one of the witnesses to the party’s signature in such cases, and the *res gestæ* at the time of the execution should be such as to show that the party then understands the purport of the deed he is granting.

Moreover, in all cases of transactions or bargains between parties having opposite interests, it ought to be considered indispensable that they have separate agents. In Clunie’s case, where the transaction set aside had been conducted by an agent of the highest respectability, this rule had not been observed; on which Lord Cockburn remarks, ‘the party had lost his capacity of reasoning. . . . Being in this condition, he is going to enter into a bilateral contract, and he does enter into it, and makes a ruinous bargain,—for the lesion is not to be disputed. Well, who protects him in making this bargain? By whose intellect is the weakness of his own intellect protected? Why, by the agent of the party dealing with him, and by him alone.’

The rule, that in such cases there ought to be separate agents, is so absolute, that no desire of the parties themselves should be considered as an authority to act for both; for their safety, as well as on account of the agents themselves, this ought to be avoided; and each party should be represented by a separate agent. In certain circumstances, indeed, it may be necessary for one, who is the ordinary adviser of both of the parties about to enter into a transaction, to decline to represent either.

The guardians or judicial factors of persons incapacitated by unsoundness of mind are in all cases subject to the provisions of the Pupils Protection Act; and generally their powers at common law, and the manner of obtaining extension thereof, are similar to those of tutors or factors acting under judicial appointment. The cases in which special powers are applied for by the guardians of lunatics are very frequent and very various in their character. I will not attempt any enumeration or classification of them, as they bear strong resemblance to those occurring in connexion with the guardians of minors; and, like

them, are all dependent on their own particular circumstances. Moreover, whilst the right of the Court to grant special powers appears to be the same in both classes of cases, their unwillingness to exercise that right is not less strong in the case of lunatics than in that of pupils.¹

The only other cases as to special powers, to which I think it necessary to direct your attention, are—

(1.) Mathieson,² in which you will find set forth the procedure to be adopted, where it is necessary to realize the moveable estate in England belonging to the lunatic, with a view to investment of the proceeds on heritable property in Scotland.

(2.) Scott,³ where a curator *bonis* was held entitled to convey his ward's estate, although the feudal title was completed in the person of the ward; and

(3.) Morison,⁴ in which, a judicial factor having realized the funds of the estate, and invested part thereof in loan on railway debentures, the Court refused to pass his accounts. He thereupon realized the objectionable securities, and again applied to have his accounts passed. This was agreed to, but he was found not entitled to charge the expense of the first application to the estate. This was the case of the judicial factor on a trust estate; but the objection to railway securities is equally applicable to all judicial factories.

I have already noticed the Pupils Protection Act, so far as specially bearing on the question of the powers of tutors and curators, in which respect the Act bears equally on the powers of the guardians of lunatics as of minors; and before leaving that subject, I think it proper to refer shortly to some other Acts, recently passed, which affect the powers and immunities of tutors and curators, whether to minors or lunatics.

I notice, first, the Entail Amendment Act,⁵ which, by sect. 31, authorizes the Court to appoint tutors or curators *ad litem*, or curators *bonis*, or other guardians, to act or give the consent required to disentails or other proceedings on behalf of pupils, minors, or incapable persons; and the guardians so appointed are declared free of responsibility, except on the ground of corruption. Their consent, moreover, is declared as effectual as if granted by persons of full age and legal capacity. This clause, you will observe, does not reach ordinary tutors or curators, only those specially appointed under the Act; and, accordingly, it is usual and necessary to obtain tutors or curators *ad litem* appointed under the Act, even where the pupils or minors already have ordinary tutors or curators.

Again, the Lands Clauses Consolidation Act for Scotland (1845),⁶ and various other Acts, in reference to railways and other public undertakings, passed of or about the same date, authorize tutors and curators to sell

¹ See Maconochie, *Petitioner*, already referred to, 3d Feb. 1857, 19 D. 366.

² Mathieson, 26th June 1857, 19 D. 917.

³ Scott, 21st Feb. 1856, 18 D. 624.

⁴ Morison, 5th Dec. 1856, 19 D. 132.

⁵ 11 & 12 Vict. c. 36.

⁶ 8 & 9 Vict. c. 19, s. 7.

lands, or execute extraordinary acts, and to enter into all necessary deeds for that purpose; the purchase money or compensation, payable in respect thereof, being usually appointed to be deposited in bank, subject to the orders of the Court of Session. In this way, the undertakings authorized by these Acts are not hindered, and the rights of the pupils are substantially protected. And the Drainage and Inclosure Act,¹ with its continuations and extensions, and the Lands Improvement Companies Acts,² have special clauses authorizing the tutors and curators of pupils and minors, and incapacitated persons, to obtain the benefits intended by these Acts, by charging their wards' estates with repayment of loans obtained for the purposes of the Acts.

The office of tutor, or of curator *bonis*, or factor *loco tutoris*, to a lunatic, falls by the party's convalescence or death. In case of convalescence, the tutor, or curator, or factor should denude of any estate vested in himself in favour of the party. In case of the party's death, the estate should be made over to his legal representatives, or disposed of as they direct. A sale by a curator, after the ward's death, of subjects contained in a bond and disposition in security granted to the curator, was found invalid.³

CHAPTER III.

MARRIED WOMEN.

I HAVE now to consider the incapacity to grant deeds arising to women by their marriage.

HUSBAND'S RIGHTS IN REGARD TO WIFE'S ESTATE.

In regard to the wife's estate, the husband acquires two rights by his marriage, viz :—(1.) The *jus mariti*, which transfers to him all her personal estate, under the exceptions to be noticed when we are considering matrimonial writs, which exceptions now extend to the cases provided for by the Conjugal Rights Amendment Act of 1861.⁴ This transference, when it takes place, is operated *ipso jure*; though we shall find, in reference to bills and promissory-notes, that it is sometimes convenient to have a transference by indorsation in ordinary form besides. (2.) The husband, as his wife's curator, acquires the right of administration of her whole estate not transferred to him by the *jus mariti*.

So far as the estate is transferred to the husband by the *jus mariti*, the wife's power is excluded of course, because the estate is no longer hers. At common law an exception arises, when a married woman, living apart from her husband, is engaged in trade on her own account; and by the Conjugal Rights Amendment Act, an exception arises in the case of a married woman who has been deserted by her husband, upon

¹ 9 & 10 Vict. c. 101, s. 24.

² 16 & 17 Vict. c. 154, and 19 & 20 Vict. c. 70 (Local Acts).

³ Duff, 23d May 1849, 11 D. 1054.

⁴ 24 & 25 Vict. c. 86.

the completion of the proceedings prescribed by the Act; but where a married woman, not engaged in trade, indorsed a bill payable to her without her husband's consent, and the indorsee was aware that the husband was ignorant of the transaction, it was found in a question with the indorsee that the indorsation was inept; as also a charge given by the indorsee to the acceptor.¹ The wife is so absolutely under the curatorial power of her husband, that, when his *jus mariti* and right of administration are not excluded, she cannot, without his consent, and even as to her own estate, heritable or moveable, grant any deed *inter vivos*, and to take effect during her life;² and it is very doubtful whether she can effectually grant an ordinary personal obligation *stante matrimonio*, though only to come into operation after her own and her husband's death.³ It is said to have been found in an old case⁴ that an obligation of that nature could be validly granted; but the authority of that case, which is very briefly reported, is doubted by Mr. Fraser;⁵ and the decision, as reported, was not held as a precedent in Miller's case.

The curatorial power of the husband draws back to the proclamation of banns, in the case of a regular marriage; so that, although the wife has the power of resiling from the marriage at any time before it actually takes place, yet, where the marriage goes on, deeds *inter vivos* granted by her after the proclamation, without her husband's consent, are reducible. The nullity of deeds granted by a wife without her husband's consent operates against such deeds, though the husband's *jus mariti* is excluded, and the husband is absent from the kingdom for a temporary purpose, if the right of administration is not likewise excluded.⁶ The inability to grant deeds without the husband's consent extends to leases of the wife's heritable property; for, although the heritable property does not fall under the *jus mariti*, the granting of leases is an act of management to which his consent as administrator is necessary;⁷ and deeds, originally null for want of his consent, do not become valid by his ratification of them after her death.⁸ By her death his curatorial power is at an end, and a *jus quasitum* has arisen to her heirs, with whom alone it rests to ratify the deed or not. Moreover, her legal person is so merged by the marriage, that a mere personal obligation by her, in which she has no beneficial interest, creates no liability against her, even though granted with her husband's consent.⁹ Such obligations Mr. Fraser holds null, *ipso jure*.¹⁰ They are at all events null by exception, and cannot be the ground of diligence against the wife's separate estate;¹¹ nor do they acquire force by her judicial ratification of them during her

¹ Binny, 26th Jan. 1836, 14 Sh. 355.

² Erskine, i. 6. 22.

³ Miller, 3d Feb. 1859, 21 D. 377.

⁴ Colquhoun, Feb. 1720, M. 5973.

⁵ Fraser's Personal and Domestic Relations, i. 274.

⁶ Rennie, 8th Dec. 1840, 13 Jurist, 73; reversed 25th Mar. 1845, 4 Bell's App. 221.

⁷ Erskine, i. 6. 27.

⁸ Bullions, 4th Dec. 1793, M. 6149.

⁹ Erskine, i. 6. 25; Harvey, 21st Feb. 1791, M. 5980; Bell's Octavo Cases, 255.

¹⁰ Fraser, i. 245.

¹¹ Menzies, 8th Dec. 1761, M. 5974; Walker, 4th Dec. 1827, 6 Sh. 204.

marriage, because her ratification during marriage is no better than the deed which it professes to confirm.¹

The husband's *jus mariti* and right of administration can, however, be effectually excluded by the wife before marriage, or by third parties, either before or after marriage, as to any estate given by them to the wife; or these legal rights can be renounced by the husband himself;² or these rights can be excluded in terms of the Conjugal Rights Amendment Act of 1861, by virtue of the proceedings thereby authorized, where such proceedings are competent. When both the *jus mariti* and the right of administration are excluded, the wife can validly grant deeds, *inter vivos*, affecting her separate estate, by herself without her husband's consent.³ A wife, moreover, when living in family with her husband, can incur obligations to bind him for necessities under her *præpositura*, that is, her right of administration of domestic matters. On the principle that she is his mandatory to that effect, she can also bind him for necessities in a variety of other circumstances, into the detail of which I do not enter. You will find them stated in Morison's Dictionary, under the title 'Husband and Wife,' and by Mr. Fraser.⁴ But when she is living with her husband she does not bind herself for necessities, though supplied on her order, as she is merely acting for him.⁵ She can, however, for necessities, bind her aliment, if she has any allowed her; and her separate estate, if she has any, whether aliment is allowed her or not, in a variety of cases, which you will find set forth in Morison and Fraser, as above. Moreover, when she is in permanent separation from her husband, and carrying on trade on her own account, the common law allows obligations contracted by her to be binding on her personally, from favour to her; because, unless she could so bind herself, no one could with confidence enter into business transactions with her, and carrying on trade, which may be her only means of obtaining a livelihood, would be impossible.⁶ This doctrine was recognised, after most careful consideration, in the case of Orme;⁷ and, under the Conjugal Rights Amendment Act, sect. 1, a wife, deserted by her husband, can apply to the Court of Session for an order to protect property acquired by her own industry, or to which she has succeeded or acquired right after the desertion, against her husband or creditors, or others claiming through him. The application, if successful, will be granted by an interlocutor, which is to be intimated in one or more newspapers published in the county within which the wife is resident, and in such other newspapers as the Court may appoint. It was held that a *prima facie* case of the 'desertion' contemplated by the above section had been made out by a wife, whose husband had

¹ Birch, 18th Feb. 1663, M. 5961; Sinclair, 8th Nov. 1677, M. 5647.

² See on this point Murray's Trustees, 5th Feb. 1745, M. 5842; Keggie, 25th May 1815, F. C., contrary to the opinion of Lord Stair, i. 4. 9.

³ Gordon, 16th Nov. 1832, 11 Sh. 36; Primrose, 9th March 1850, 12 D. 917.

⁴ Fraser, i. 245, *et seq.*

⁵ Erskine, i. 6. 26; Mitchelson, 12th Dec. 1780, M. 5886.

⁶ Churnside, 11th July 1789, M. 6082.

⁷ Orme, 30th Nov. 1833, 12 Sh. 149.

become bankrupt, and had left this country and gone abroad without stating where he was to settle, and who, in the meantime, was not contributing to the maintenance of his wife or family.¹ By section 4, after the interlocutor granting protection is published, the wife's property referred to in section 1 is declared to belong to her as if she were unmarried; and, by section 5, the order of protection, when made and intimated, is to have the effect of a decree of separation *a mensâ et thoro* in regard to the property, rights, and obligations of the husband and of the wife, and in regard to the wife's capacity to sue and be sued. As regards the effect of such decree, section 6 provides that, after the same is obtained at the instance of the wife, all property which she may acquire, or which may come to or devolve upon her, shall be held as property belonging to her, in reference to which the *jus mariti* and her husband's right of administration are excluded; and such property may be disposed of by her as if she were unmarried, and, on her decease, intestate, shall pass to her heirs and representatives; in like manner as if her husband had been then dead. These enactments are subject to various qualifications and exceptions, which I need not here detail. The order of protection, moreover, can be recalled by the Court on cause shown, or it will fall to the ground by the state of separation coming to an end.

The Act does not expressly affect the common law, as settled in Churnside's and Orme's cases; but wherever the Act applies, and its provisions are followed out, it will practically supersede the common law, and parties will not readily deal with a married woman, though carrying on business on her own account, and deserted by her husband, until an order of protection from the Court shall have been made and intimated in terms of the Act.

A wife's person is, in general, exempted from diligence.² But she is liable to diligence on obligations lawfully contracted by her, when her husband is permanently abroad;—or absent, and reported dead,—or civilly dead;³ likewise under obligations *ad facta præstanda* lawfully incurred by her.⁴ The performance of obligations of this last description lies with her individually, and no one else; and, in general, her refusal to perform indicates not merely such inability as is usually the cause of the non-fulfilment of an obligation to pay money, but deliberate opposition. The wife can also sue, and be sued, in the case provided for by the Act of 1861, sects. 5, 6.

The peculiarity, in reference to holograph deeds, that they do not prove their own dates, if not *in re mercatorid*, requires to be kept in view in relation to deeds of that description granted by women. Thus, a holograph obligation by a woman, granted before her marriage, not being *in re mercatorid*, is liable to be objected to after her marriage, on the ground

¹ Turnbull, 14th Jan. 1864; 2 Macph. 402.

² Buchanan, 17th June 1828, 6 Sh. 986; Thomson, 27th Nov. 1828, 7 Sh. 71.

³ Dall, 29th June 1733, M. 6002; Fraser, i. 268.

⁴ Anderson, 27th July 1775, M. 6081; see also Tait, 4th June 1831, 9 Sh. 680.

that it was granted after the marriage, and without her husband's consent. It is advisable, therefore, that all such obligations should be placed on record, or their date otherwise put beyond all question, as early as possible after they are issued or delivered.

At common law, a married woman can, by *mortis causâ* deed, without consent of her husband, and though his *jus mariti* and right of administration are not excluded, dispose of or burden her moveable estate as she thinks proper; and, supposing her to be of full age, her heritable estate also; but noways to affect her husband's legal rights in either estate.¹

A wife may, if not prevented by her husband *in limine*, accept an appointment as testamentary trustee, and even as *sine quâ non*.² Lord Meadowbank expressed the distinctive principle applicable to this case in these words: 'There is no sinking of her rational person by the marriage.' Such appointments, however, are by no means common, nor are they desirable.

JUDICIAL RATI-
FICATION BY
MARRIED
WOMEN.

In cases where a married woman, with consent of her husband, grants a deed affecting her own estate, or concurs with him in a deed affecting her interest in his estate, it is usual and proper to obtain from her a ratification of such deed, before a Justice of the Peace or other magistrate, to whom, and apart from her husband (whose presence would render the ratification null), she makes oath that the deed was granted or concurred in by her of her own free will, and that she will never quarrel or impugn it. The ratification is sometimes set forth in a notarial instrument, under the hand of the wife, and of the magistrate, and a notary-public and witnesses; a procurator for the party in whose favour the deed is granted requiring such instrument. But it is now usual, and quite sufficient, to take simply a ratification signed by the wife and the magistrate, which, as a judicial act, is authenticated by the subscription of these parties without attestation. Judicial ratifications by wives appear to have been in use in Scotland prior to 1481. Such ratifications are introduced for the security of third parties; and their object is to exclude reduction of the deed, at the instance of the wife, on the ground of her having been led to execute the same, through force and fear, or undue influence, on the part of her husband. But the wife's conveyance of her own estate, heritable or personal, granted with consent of her husband, is valid without ratification, where it is not established that undue influence, on the part of her husband, led her to grant it.³ And, on the other hand, although the ratification affords *primâ facie* evidence that the deed was executed by the wife of her own free will, it does not appear absolutely to exclude reduction at her instance. Mr. Bell⁴ expresses a contrary opinion; and the terms of the decision of the Lords of Council, 6th March 1481, imported into the Scots Acts,⁵ show that of that date the ratification was

¹ Erskine, i. 6. 28.

² Stoddart, 30th June 1812, F. C.

³ Hay, 28th June 1706, M. 16,506; Buchanan, 1st March 1834, 12 Sh. 511;

Priestnell, 20th February 1857, 19 D. 495.

⁴ Bell's Commentaries, i. 142-3.

⁵ 1481, cap. 83.

held to exclude reduction. Mr. Bell's view is also supported by the early case of Grant;¹ but in an earlier case² an opposite decision was pronounced; and Erskine,³ after stating as a point of law that the wife, by her ratification, is cut off from impeaching the deed, expresses his opinion that her being so is contrary to reason, inasmuch as the undue influence may have led her to execute the ratification, as well as the deed itself; and he suggests that the law ought to reject the ratification, in like manner with the deed, on positive evidence that they were both extorted from the wife *ex vi et metu* of the husband. This is a point on which lawyers and conveyancers are divided in opinion; and we have no recent decision for our guidance. But, whatever may be the rule of law, there can be no doubt that the only proper course in practice is to require the ratification in all cases. In Hay's case, where the want of the ratification was found no ground of reduction of a deed by a married woman, with her husband's consent, the Court observed, 'That they act more cautiously who take such ratifications.' The want of a wife's ratification of a discharge granted by her and her husband to her trustees, is referred to by Lord Cockburn as of importance in a reduction of the discharge, at the wife's instance, in the case of Smith.⁴ In a disentail case,⁵ where an heiress of entail was to execute an instrument of disentail, the Court held a ratification unnecessary, but authorized it *ob majorem cautelam*. The disentail was dealt with as a deed by the wife in her own favour, on which ground the ratification was held unnecessary. But, though it was, strictly speaking, a deed by the wife in her own favour, it enabled her to dispose of her estate as she thought fit, and to convey or burden it in favour of her husband, which she could not have done without executing the disentail. I therefore think the ratification was clearly a right and proper measure.

The ratification can take place before any Justice of the Peace, the jurisdiction being voluntary. Erskine says,⁶ 'We are now insensibly coming into the custom of being contented with solemn declarations;' and he doubts if these would be sufficient should they be brought to a trial. After the passing of the Act 5 & 6 Will. iv. cap. 62, which had in view the substitution, in certain cases, of declarations in lieu of oaths, judicial ratifications were more or less taken in the form of declarations; but the Act 6 & 7 Will. iv. cap. 43, provides for the taking of judicial ratifications on oath as formerly, and places the law and practice on that subject on the footing on which it had stood before the first-mentioned Act came into operation, giving, at the same time, the full effect of an oath to ratifications obtained in the form of declarations in the meantime.

In reference to judicial proceedings against, or at the instance of, married women, it may be laid down as a general rule, that no suit can

¹ Grant, 8th July 1642, M. 16,483.

² A. v. B., 17th June 1612, M. 16,481.

³ Erskine, i. 6. 34.

⁴ Smith, 4th June 1835, 13 Sh. 870.

⁵ Brisbane, 1st March 1850, 12 D. 917.

⁶ Erskine, i. 6. 33.

JUDICIAL PRO-
CEEDINGS
AGAINST OR AT
INSTANCE OF
MARRIED
WOMEN.

be carried on against a married woman, unless her husband be called as defender along with her, for his interest, and as her curator and guardian.¹ This holds even as to delicts of the nature of verbal defamation,² but not as to what are, strictly speaking, crimes; in reference to which the wife alone is indicted, and the husband is not made a party. Neither, of course, is he cited as defender when he is himself pursuer—for instance, in a process for divorce; nor for his wife's trade debts when he is abroad, and she is acting independently on her own account, to gain her livelihood; nor in the cases provided for by the Conjugal Rights Amendment Act. Generally, the Court will appoint a curator *ad litem* to her, and it is *pars judicis* to do so, if the parties do not themselves seek an appointment.

On the other hand, a wife cannot sue in her own name without concurrence of her husband,³ unless in such cases as Churnside's and Orme's, and in the cases provided for by the Conjugal Rights Amendment Act; or where the husband's concurrence is refused without reason, or he is under disability,⁴ or unless the suit is brought against himself, or he is under sentence of transportation,⁵ in any of which cases (not being such as Churnside's and Orme's, or those provided for by the Conjugal Rights Amendment Act) the Court will appoint a curator *ad litem* to act for the wife. When the husband's *jus mariti* and right of administration were both excluded, and the wife presented a petition for disentail in her own name, the Court, *ex proprio motu*, appointed a curator *ad litem* to her.⁶ But when the *jus mariti* only is excluded, the husband's concurrence is necessary.⁷

The husband cannot, by himself, dispose of his wife's heritable estate;⁸ nor can he, without her authority, use her name for suing reduction of a deathbed deed, although he may be interested in having the deed reduced.⁹ Nor can the wife, under all circumstances, be compelled by her husband and his creditors to repudiate a *mortis causa* settlement by her father in her favour to the effect of letting in her claim, and that of her husband, and his creditors through her, to a share of her father's estate in name of legitim.¹⁰ In Stevenson's case, the repudiation would have been in the highest degree injurious to the wife and her children, as the legitim would have gone to her husband and his creditors. This is a leading case, in which the opinions of the whole Court were taken. We shall by and bye see, however, that the Conjugal Rights Amendment Act of 1861, already so often referred to, amends the law applicable to such cases, and makes the position of a wife succeeding to

¹ Erskine, i. 6. 21.

² Freebairn, 8th Dec. 1749, M. 6080.

³ Erskine, i. 6. 21; Fraser i. 275-6.

⁴ Erskine i. 6. 27.

⁵ Anderson, 8th June 1833, 11 Sh. 688.
Same case under name of Paul, 13th Feb.
1834, 12 Sh. 431; affirmed 14th June
1834, 7 Wj. & Sh. 462.

⁶ Primrose, 17th November 1849, 12 D.
917.

⁷ Borthwick, 17th Feb. 1829, 7 Sh. 420;
Jeffrey, 28th June 1826, 4 Sh. 765.

⁸ Kennedy, 29th Nov. 1848, 11 D. 171.

⁹ Aitkins, 11th Feb. 1802, M. 16,140.

¹⁰ Stevenson, 7th December 1838, 1 D.
181.

property, *stante matrimonio*, much less unfavourable than it was before that Act came into operation.

I have stated the foregoing positions of the Common Law very specially, because it appears impossible to lay down any general rule as to the cases or circumstances in which a wife can withhold her name from judicial or other proceedings, where, without her consent, they cannot be carried on. Generally, I apprehend, she must show cause for withholding; but, on the other hand, she will not be compelled to concur, where the result would be highly injurious to herself.

An obligation in itself null by exception, in respect of being granted by a wife, *stante matrimonio*, may be adopted and homologated by her after she becomes a widow, and be made binding; in other words, a woman, after her husband's death, is mistress of her own affairs, and can bind herself just like any other person who is free of all restraint, either by granting a new obligation, good in itself, or by homologating and adopting an old and imperfect one. In reporting the case of Gordon,¹ Lord Monboddo says: 'The Lords were all of opinion, that a personal bond, granted by a married woman, was not null *ipso jure*, but only *ope exceptionis*, and, therefore, might by her be homologated.' The same doctrine appears to be established by the cases noted below,² with this addition, that the right of objection, founded on the document of debt as granted by a married woman, may be lost by prescription, or by not being timeously brought forward. Thomson's case, though very special in its circumstances, merits a careful perusal, because it gives with great clearness the state of the law on some points of importance and difficulty in connexion with the present subject. I recommend particularly to your study the opinion delivered by Lord Fullerton.

CHAPTER IV.

LORD STAIR, stating his views at an early period, and before it was known how thoroughly intelligence could be developed by instruction and education in the case of parties afflicted with the loss of hearing and speech, expressed an opinion unfavourable to the power of such parties to undertake obligations or to contract.³ Referring to the Act 1585, cap. 18, on the subject of the tutory of idiots and furious persons, his Lordship says, 'This Act, by custom, is extended to deaf and dumb persons (though they be not expressed) who have tutors, in the same manner, albeit they have sufficient judgment, since they cannot act by it.' But in another passage⁴ he thus expresses himself: 'Those who are deaf

¹ Gordon, 19th Nov. 1766, 5 Br. Sup. 932.

³ Stair, i. 6. 25.

⁴ *Ibid.* i. 10. 13.

² Watson, 18th July 1672, M. 5964, & 3537; Thomson, 11th Feb. 1840, 2 D. 564.

'or dumb may contract, if they have the use of reason, and if it appear they understood what was done, and expressed their consent by their ordinary knowing signs.'

Erskine, after referring to the incapacity of the insane, says,¹ 'Upon this supposed incapacity, both the Roman Law and the usage of Scotland have disabled all from contracting who have been deaf and dumb from the birth.' But, even in Erskine's time, strong indications had been exhibited of what could be accomplished by and for the deaf and dumb; for he adds, 'there are instances of such now alive who not only are endued with strong natural parts, but can apply them to all the affairs of life, and who even act in the character of freeholder, etc., in the more public concerns of the kingdom or county.'

The principles stated by Stair contain nothing to support the exclusion of the deaf and dumb from the power of contracting, as a general rule. Erskine talks of the incapacity as 'supposed,' and immediately proceeds to show that there were cases then exceptional, in which the deaf and dumb were perfectly competent to act, and were acting, for themselves. In support of the legal view, that they were under disability, he refers to the case of Hamilton;² but not only was that decision pronounced before it was known what could be done for the deaf and dumb, but it does not, as reported, bear out the position that such parties are incapable.

Professor Menzies notices³ that such parties are admitted as witnesses in criminal cases, and their testimony taken by interpreters, referring to the cases noted below;⁴ and it is quite clear that now their incapacity will never be assumed, but will require to be proved very much as in an ordinary case of alleged mental incapacity. The want of hearing and speech, in fact, is just the absence of the most important of the ordinary channels of instruction on the one hand, and of utterance on the other. But modern philanthropists have greatly overcome the difficulties thence arising; and, in point of fact, the deaf and dumb can and do engage in the most solemn contracts—marriage, copartnership, etc.—and perform any lawful act, such as disposing land, just as other persons are in the habit of doing, as far as capacity is concerned; because they have the same mind with other people, the same understanding and will, and they have means of communicating with their fellow-men, by writing or by signs, which, looking to first principles, are not more conventional than words.

I may here, however, notice a case⁵ where a man in advanced age, and who had long been so deaf that information had to be conveyed to him in writing, became almost totally blind. The Court, on the petition of a near relative, appointed a judicial factor to him; sub-

¹ Erskine, iii. 1. 16.

² Hamilton, 9th July 1663, M. 6300.

³ Menzies, p. 42, 3d edit.

⁴ Martin, 13th June 1823; Wintrup, 19th Sept. 1827.

⁵ Wilson, *Petitioner*, Nov. 1856, 29 Jurist, 20; referred to in the case of the Accountant of Court, 21st Feb. 1857, 19 D. 504.

sequently they found that this appointment did not fall under the Pupils Protection Act, reserving right to apply for the appointment of a curator *bonis*, which would clearly fall under that Act.

A further ground, on which parties may be incapacitated to grant, by INTERDICTION themselves alone, voluntary deeds, *inter vivos*, affecting their heritable estate, arises from interdiction, which Erskine¹ defines 'a legal restraint laid upon those who, through their profuseness or the extreme facility of their tempers, are too easily induced to make hurtful conveyances.'

Interdiction is either voluntary or judicial. Voluntary interdiction is created by a deed called a bond of interdiction, from the party himself, usually binding himself not to sell lands, nor grant bonds, nor do any act or deed to affect his property, without consent of certain parties named, and who are called his interdictors, declaring all acts done without their consent null. Judicial interdiction, which is competent only to the Supreme Court, is imposed by a sentence, disabling the party from granting deeds to his prejudice, without consent of the interdictors. Such sentence may proceed, either on an action brought against the prodigal by his heir, or next of kin, or *ex nobili officio* of the Court.²

Interdiction, whether voluntary or judicial, is followed by letters of publication, which require to be executed or published at the market cross of the head burgh of the shire where the party resides; and, within forty days after, such publication must be registered either in the Register of Inhibitions, Interdictions, etc., within that shire, or in the General Register at Edinburgh. The interdiction, if registered within the shire of the party's residence, must be registered also in the Register of Inhibitions, Interdictions, etc., of any other shire where the lands of the interdicted person lie, otherwise it is null as regards such lands.³ The interdiction, until published, has no effect against third parties;⁴ and, even though published, it will fall as against third parties, unless registered within forty days. But, as soon as it is delivered, it operates against all deeds subsequently granted in favour of the interdictor; for it is his duty to publish and register the interdiction, and he is *in pessimâ fide* to delay doing so, in order to avail himself of a deed in his own favour.⁵

The interdiction applies in its language (as it did anciently in its effects) to moveable as well as heritable estate, and to deeds of all kinds; but, for a long time, its operation has been confined to deeds affecting the heritable estate, granted to the prejudice of the party interdicted, without consent of his interdictors.⁶ The party has accordingly full power over his moveables, which he can sell or gratuitously alienate.⁷ He can also

¹ Erskine, i. 7. 53.

² Robertson, 17th February 1681, M. 7134.

³ 1581, c. 119; 1600, c. 13; and 1672, c. 16; 'Concerning the Regulation of Judicatories,' art. 32.

⁴ Cranston, Nov. 1586, M. 7125.

⁵ Grierson, 24th July 1678, M. 6298; Tenants, Dec. 1725, M. 7127.

⁶ Erskine, i. 7. 57.

⁷ Crawford, 20th June 1671, M. 2741; Davidson, 8th Feb. 1684, M. 7142.

grant personal bonds which shall validly affect his person, and likewise his moveable estate; and he can grant effectual deeds, in reference to his heritable estate, when these are onerous,¹ or even rational.² In Kyle's case, a sale to one of the interdictors (a transaction to be looked on with great jealousy, and as a general rule absolutely avoided) was sustained as onerous and rational. He can also settle his moveable estate by testament. Erskine says,³ 'He cannot make any settlement, or alter the destination of his heritable estate;' but this view is combated in Brodie's Stair,⁴ likewise by Professor Menzies;⁵ and in the case of Mansfield,⁶ opinions were given by a great majority of the Court, that 'to mere *mortis causâ* deeds regulating the succession to the interdicted party, agreeably to his own pleasure, but constituting against him no alienation or obligation, the reason and the form of interdiction seem to have no application; and we are not aware of any sufficient authority for extending its effect to such deeds.' Opinions to the same effect appear to have been given by the Court in the case of Gray,⁷ and the point, though not decided by a judgment, may be held as settled in favour of the party interdicted.

Interdiction, when voluntary, may be limited in its extent and application, by the terms of the bond imposing it, or of the letters of publication following thereon.⁸ It has no retrospective effect in any case.⁹ The causes of granting do not require to be explicitly narrated in the bond of interdiction.¹⁰ Motives of delicacy often prevent such causes from being enlarged on. The Juridical Styles¹¹ contain a very good form of the bond.

Deeds granted by the interdicted party, with consent of his interdictors, are as valid as those by parties free from all restraint; and there is not, as in cases of minority, any right of restitution to the party against such deeds, whatever lesion he may offer to prove. His remedy in such cases is in an action against the interdictors for damages, arising by their undue consent;¹² and the expectant heir of the interdicted party can insist for the removal of the interdictor, for consenting to improper deeds.¹³ But all that the interdictors are answerable for, is their fault or fraud in concurring in deeds granted by the interdicted party to his prejudice, and which would have been null but for their consent.¹⁴ An interdictor cannot accept an obligation for payment of money, as the consideration of his consent to a transaction affecting the interdicted person's lands.¹⁵

¹ Stuart, 27th Feb. 1672, M. 3094.

² Kyle, 14th Dec. 1826, 5 Sh. 128.

³ Erskine, i. 7. 58.

⁴ Brodie's Stair, p. 63, Note (d.) and p. 583, Note (f.)

⁵ Menzies, p. 45.

⁶ Mansfield, 26th June 1841, 3 D. 1103.

⁷ Gray, 8th November 1751, 5 Br. Sup. 790.

⁸ Dingwall, 12th July 1749, M. 7152.

⁹ Erskine, i. 7. 54.

¹⁰ Brainer, 13th Feb. 1789; noticed in Ivory's Erskine, Note, p. 203.

¹¹ Juridical Styles, vol. ii. p. 110.

¹² Erskine, i. 7. 58.

¹³ Cameron, 12th Dec. 1810, F. C.

¹⁴ Erskine, i. 7. 59.

¹⁵ Carnoussie, 30th July 1622, M. 9455.

Interdiction cannot be terminated at the will of the party. When voluntary, it may be annulled by the sentence of a Judge, finding that it was causeless from the first, or that the party has become *rei sue providus*; or by the joint act of the interdictors and interdicted declaring it recalled of consent; or by the death of all the interdictors; or of one who was declared a *sine quo non*; or, if a determinate number is required, of so many as that such number does not remain. Judicial interdiction is removed only by the sentence of the Court which imposed it, finding that the party does not longer require restraint.¹

Our books report a considerable number of cases depending on the INTOXICATION. question whether the parties were, at the time of granting deeds, in such a state of incapacity from drunkenness as to be for the time deprived of reason. The rules affecting both parties in such cases are forcibly stated in an English case,² where Sir William Grant, Master of the Rolls, held—1. That a Court of Equity ought not to give its aid to one who has obtained an agreement from another in a state of intoxication; nor 2. To relieve one from a contract merely because he was drunk when he made it; but 3. That if there be inducement and seduction to drink, or advantage unfairly taken of the imbecility of drunkenness, judicial interference may be justified; and 4. That a state of absolute deprivation of reason by intoxication invalidates a deed as null and void. In another English case,³ Lord Ellenborough said, ‘There was no agreement if the defendant ‘was intoxicated when he signed the paper; he had not an agreeing ‘mind.’ In the Scotch case of Johnston,⁴ which was an action of implement of a minute of agreement, the following issue was sent to a Jury: ‘Whether the said minute of agreement was signed by the said ‘A. B. when so drunk as to be wholly incapable of understanding business?’ More recently, the Lord Justice-Clerk Inglis, in disposing of a case where the plea of intoxication was brought forward as a ground of reducing a contract of sale of cattle, said, ‘It appears to me that the ‘issue between the parties is not whether the defender was under the ‘influence of liquor, or whether he was in such a condition that it would ‘be better for him not to enter upon business at that time, but whether ‘he was perfectly incapable, from intoxication, of entering into business ‘transactions, and completing such as he had begun.’⁵ These cases will show the special nature of the test to be applied where reduction is sought, or implement is refused, on the ground of drunkenness. But the incapacity must be decided, and the evidence clear.⁶ In Haltoun’s case it was found that the party, when he subscribed, was not so drunk as not to have the use of his reason, and the plea or ground of reduction founded on drunkenness was repelled.

¹ Erskine, i. 7. 55.

⁵ Taylor, 16th June 1864; 2 Macph.

² See Bell’s Illustrations, i. p. 17; Cook and Clayworth, 18th Feb. 1811.

1226.

³ *Ibid.* Pitt v. Smith, 1811.

⁶ Lord Haltoun, 29th July 1672, M.

⁴ Johnston, 19th Dec. 1854, 17 D. 228.

13,384.

ATTAINDER AND
OUTLAWRY.¹

A person attainted for high treason is incapable of holding estate, heritable or moveable, all his property being forfeited to the Crown; neither can he validly enter into obligations or contracts. But he is not entitled to plead his own incapacity in bar of his own obligations.²

A question occurred in the case of *Macrae*,³ as to the right of a party, under sentence of outlawry for non-appearance on a criminal charge, to give directions to trustees (to whom, previous to the outlawry, he had conveyed his estate) for executing a deed of entail; and as to the validity of the registration of an entail executed in terms of his instructions;—and it was found that the entail and registration thereof were valid and effectual, in respect that a sentence of outlawry does not deprive a party of the fee of his estate, or of the power of disposing of such fee.

ALIENS.

An alien, in a legal sense, is a person born out of the allegiance of the Queen, of parents neither of whom was a natural-born subject of the Crown, and whose father was not at the time of the birth of such person held to be a natural-born subject, by any of the Acts to be immediately referred to. Aliens are incapable of acquiring heritage in Scotland, either by purchase or succession.⁴ The rules of policy, on which the exclusion of aliens, as here stated, was founded, have been greatly relaxed by successive Statutes. By the Acts 7 Anne, cap. 5, and 4 George II. cap. 21, children, born out of the allegiance of the Crown, whose fathers were natural-born subjects of Britain, at the time of such children's birth, are to be held natural-born subjects. By 13 George III. cap. 21, the same privileges are conferred on the children of fathers who, in virtue of the former Statute, were to be deemed natural-born subjects, though their mothers were aliens. But the children must be lawful from the time of their birth.⁵ And by the Act 7 & 8 Victoria, cap. 66, the children, born out of Her Majesty's dominions, of mothers who were natural-born subjects, are declared capable of taking estate, real or personal. Every alien, being the subject of a friendly state, may take and hold every species of personal property except chattels real, which are interests issuing out of, or annexed to, real estates, such as terms for years of lands; and every alien residing in the United Kingdom, and being the subject of a friendly state, may take and hold lands for the purpose of residence, or for trade or business, for any time not exceeding twenty-one years; with all the privileges of a subject, except the right of voting for a Member of Parliament. And upon obtaining the certificate, and taking the oath prescribed by the Act, every alien residing in Great Britain or Ireland, with intent to settle therein, shall enjoy all the rights and capacities of a natural-born subject, except that of becoming

¹ *Erskine*, iii. 1. 16.

² *Serra*, 24th Dec. 1725, M. 10,449.

³ *Macrae*, 22d Nov. 1836, 15 Sh. 54; affirmed 27th June 1839; *Maclean and Robinson*, 645.

⁴ *Erskine*, iii. 10. 10; *Leslie*, 8th June

1749, M. 4636; *Dundas*, 15th Nov. 1839, 2 D. 31; and *Alexander, Petitioner*, 8th July 1852, 14 D. 981.

⁵ *Shedden*, 11th March 1852, 14 D. 721; affirmed 15th May 1854, 1 Macq. App. 535.

a member of the Privy Council, or of Parliament ; or such privileges, if any, as shall be excepted from his certificate. The Act further gives to an alien woman, married to a natural-born subject, or person naturalized, the rights and privileges of a natural-born subject ; but reserves any rights or interests, vested or contingent, under any will, deed, or settlement, previously executed by any natural-born subject of Great Britain or Ireland.

Professor Bell, in his *Principles*,¹ suggests a doubt whether an alien wife of a landholder in Scotland would have right to *terce*, and an alien husband of an heiress to *courtesy*. This Act clearly gives the wife right to *terce* in case of her *survivance*. But the husband would require to obtain the prescribed certificate, and take the oath, in order to secure his *courtesy* ; and generally, the certificate should be obtained, and the oath taken, by all parties entitled to, and desirous of securing, the privileges conferred by the Act. During the time of war, an alien, under allegiance to an enemy, cannot, without the Queen's special license, pursue for debt in this country ;² nor is his assignee better than himself as to the recovery of debt.³ His right to the debt, however, is only suspended until the close of the war, not forfeited.⁴

¹ Bell's *Principles*, 2134.

² Carron, 28th Nov. 1809, F. C.

³ Johnston, 15th Feb. 1809, F. C.

⁴ Bell's *Principles*, 2135.

TITLE V.

UNLAWFUL CONSIDERATION, AND UNLAWFUL SUBJECT-MATTER.

WE have now examined the general requisites to be observed in the authentication of deeds ; and have seen that certain parties are wholly, and others to a certain extent, subject to legal incapacity as regards the granting of deeds. But a further preliminary inquiry remains to be gone into. The object of all law is to promote what is beneficial and right ; and, in order that deeds may be sanctioned and enforced by Courts of Law, the consideration for which they are granted, as well as their subject-matter, must be agreeable to good morals and public policy. Whatever is contrary to the moral or public law, therefore, is to be excluded from contracts or obligations. The general rule on this point is thus stated by Professor Bell in his Commentaries :¹ ‘ No claim or right of action can ‘ spring out of an illegal contract ; ‘ no Court will lend its aid to give ‘ sanction to a claim grounded upon immoral or illegal acts.’ In his Principles,² Mr. Bell quotes the maxim, adopted by our law from the Roman law, applicable to such cases, viz., *melior est conditio possidentis vel defendentis*, which operates in this way :—no one can, at his own hand, enforce a claim against a recusant obligant ; when parties refuse to fulfil their obligations, the aid of the Court is required ; and, if the Court will not assist them, they are powerless ; the Court, however, does refuse its aid to enforce an unlawful contract, and so the party in possession continues to hold,—*melior est conditio possidentis*. The party in possession gets the better of the claimant, because of the Court’s refusal to interfere.

There are thus certain classes of contracts or obligations which cannot receive effect through the instrumentality of a deed, however regular and complete in point of form, and there are others in which clauses and stipulations in regular deeds will be allowed only modified effect.

BONDS GRANTED
FOR IMMORAL
PURPOSES.

Contracts or obligations *contra bonos mores* can receive no effect.

No claim will be enforced, founded on a bond granted as the price or wages of prostitution,³ especially when the bond shows that it was to be

¹ Bell’s Commentaries, i. 298.

² Bell’s Principles, p. 18.

³ Bell’s Illustrations, i. p. 59, and cases of Hamilton and Friend there cited.

forfeited in case of the return to a virtuous life.¹ The objection of immoral consideration may also be stated in reference to a legacy by will; it is open to the executor to inquire whether the bequest was given *ob turpem causam*, with a view to its being set aside, if granted for such cause.² But, as a general rule, a bond to the victim of seduction, granted after the criminal intercourse has ceased, and as a provision and compensation for injury done, and not being the result of any promise under which the illicit connexion had been carried on, will sustain a claim.³ The same principle, however, which bars action on a bond or bill granted for an unlawful consideration, previous to payment, equally bars the claim to restitution after payment. The Court will not interfere in either case, therefore *melior est conditio possidentis*.⁴

Obligations offensive to decency or morality, or having a tendency to mischievous or pernicious purposes, are not actionable. Thus action was refused for the price of a picture, which the defendant had cut to pieces as libellous.⁵ Likewise on a wager, connected with the life of Napoleon Buonaparte;⁶ and for the price of printing an obscene and indecent book.⁷ On the principle that marriage ought to be free of all improper restraint, and that it should proceed from free choice, a general restriction against marriage, imposed as the condition of the grant of a bequest, or the like, will be void.⁸ A bond or obligation by any individual engaging not to marry is null, as encouraging irregularity of life, and devoid of any proper interest in the obligee.⁹

Again, where a widow executed a trust-conveyance of her whole property acquired, and to be acquired, for behoof of herself in liferent, but so long only as she should remain unmarried, and to her deceased husband's children in fee, the qualification of her right of liferent was held ineffectual, as being in restraint of marriage; and, on the same ground, the conveyance of the fee was held effectual only as regarded what belonged to her previous to a second marriage.¹⁰ But there is nothing illegal in a stipulation in a contract or mutual deed of settlement between spouses, that the provision in favour of the surviving spouse shall be terminable in case of his or her entering into a second marriage.¹¹

Although, however, everything of the nature of improper restraint, even when clear of direct fraud, is to be looked on with disfavour, distinctions are to be drawn between conditions relative to marriage, when imposed (1.) In obligations granted by a father, in consequence of his natural liability to provide for his children; (2.) When he is merely granting an additional provision; and (3.) When the condition is imposed by third parties. Lord Kilkerran discusses the rules applicable to

¹ Bell's Illustrations, i. p. 60, and case of Walker there cited.

² Johnstone, 4th Dec. 1835, 14 Sh. 106.

³ Bell's Commentaries, i. 299, and English cases there cited.

⁴ Hamilton, 21st May 1816, F. C.

⁵ English case of Du Bost, Bell's Illustrations, i. p. 61.

⁶ Gilbert, Bell's Illustrations, i. p. 62.

⁷ Poplet, *ibid.* p. 62.

⁸ Roper on Legacies, White's edition.

⁹ Bell's Commentaries, i. 301.

¹⁰ Leith, 25th Jan. 1853, 2 Stuart's Cases, 197.

¹¹ Kidd, 10th December 1863, 2 Macph. 227.

these cases, in his report of the case of Mackenzie;¹ and holds that a bond by the father, in fulfilment of his natural obligation to provide for his children, would be exigible, if a suitable marriage should take place, although the consent of third parties to his child's marriage, stipulated for by the father, should not have been obtained;—but that the condition would be strictly construed, in the case of conditions imposed by third parties, or by the father, in reference to additional provisions, and stipulating for his own consent; which propositions are supported by the cases noted below.²

Such a condition was found not transgressed when not known to the party; in which case the irritancy was found not incurred.³ But ignorance of the condition was thought of no importance in Mackenzie's case; and effect was given to an absolute condition by a father, applicable to his daughter's marrying without his consent, though she had been privately married before the date of the bond.⁴ But, where the consent of third parties is the condition, such consent can be given effectually after, as well as before, the marriage,⁵ even although the clause shall in its terms require the consent to be first had and obtained.⁶ And the special form of giving consent pointed out in the deed of provision will not be insisted in, if there really is consent.⁷ Moreover, the refusal of third parties to give the consent, stipulated to be required of them, will not be effectual if they decline to give a reason for refusing;⁸ especially if the party refusing consent, and declining to give his reason, has a personal interest to refuse, as being debtor in the bond containing the provision.⁹

On the same principle of the Law's jealousy of all undue interference with marriage, marriage brokerage contracts, that is, agreements or bonds for a premium to be given to a broker, or matchmaker, for his or her influence in bringing about a marriage (*proveneticum*), are void. The decisions on that point are very numerous, and such contracts have never been sustained.¹⁰

DOMESTIC RELATIONS.

Any stipulation which interferes with the natural exercise of the domestic affections, and relative duties, is also looked upon very unfavourably by the Law. It is not in all cases disallowed; for we have seen Courts of Law depriving a father of the guardianship of his children; and, in recent cases, refusing to support a father's claim to intercourse with his children; and withdrawing children from the custody of their

¹ Mackenzie, 6th June 1750, M. 2977.

² Dalziel, 9th June 1687, M. 2971; Rae, 17th Jan. 1673, M. 2966; Buchanan, 13th Feb. 1680, M. 2968.

³ Fetterneer, 3d Dec. 1686, M. 2969; Hamilton, 13th Feb. 1681, M. 2970.

⁴ Hay, 27th Nov. 1781, M. 2982.

⁵ Buntin, 7th July 1710, M. 2972.

⁶ Wellwood's Trustees, 21st June 1851.

13 D. 1211; same parties, 17th Dec. 1856, 19 D. 187.

⁷ Grahame, 9th Feb. 1774, M. 2979.

⁸ Foord, March 1682, M. 2970.

⁹ Pringle, 20th July 1688, M. 2972.

¹⁰ See on this point the cases reported in Morison's Dictionary, beginning at p. 2963, and the English cases cited by Professor Bell in his Illustrations, vol. i. pp. 63, 64, and Bell's Commentaries, i. 302.

mother; and, in a case requiring extreme measures, it is probable that the Court would give effect to stipulations in private deeds, so far at least as to sanction a clause contingently involving the forfeiture of a patrimonial possession. But unless strong cause be shown, and especially if it appear that the stipulation is suggested by morbid feeling, I apprehend that it would not be allowed effect.¹ In Reid's case, a party by his settlement conveyed his estate to trustees for his nephew, under a condition that the nephew should not reside with his mother, or any of her relations, nor his mother with him; and that, if he should contravene, the trustees should withhold from him all benefit under the settlement, during the period of contravention. Nothing is said in the report as to the character or status of the mother, or her relations. The rubric of the report bears that such condition 'is lawful in a settlement by an uncle upon his nephew;' which is also stated to be its purport in Ivory's Erskine.² But perhaps the case, as reported, scarcely goes so far. In Fraser's case, a condition was made by a father in his will, that his daughter should forfeit her provision if she resided with her mother. The mother's character was proved, and admitted by the testator's trustees, to be pure and irreproachable; and the condition was held *contra bonos mores*, and *pro non scripto*. I will read to you the views most emphatically expressed by the Lord President Boyle, at disposing of this case. His Lordship says, 'This is certainly and most happily an unusual case. If this is not a condition *contra bonos mores*, it is impossible to say what is such a condition. It is admitted that there is not the least ground for any insinuation against the maternal conduct of the pursuer's mother. Taking it for the fact that her conduct has been perfectly irreproachable, I hold that there is not the least reason for thinking that this young lady, if left under her management, would suffer any moral contamination from her society. I think, therefore, that there cannot be the least difficulty in holding that this condition is *contra bonos mores*. I deny that any parent is entitled to dissolve the obligations under which the child lies to the other parent. A father has no title to say to his child, "You forfeit your rights from me if you do not cease to discharge your duties to your mother." While there is an express command of Almighty God, "Thou shalt honour thy father and thy mother," I hold that such a condition as this, whatever equivalent may be held out as its reward, is directly *contra bonos mores*, and contrary to the best interests of society.'

The passion which dictates such unnatural provisions, I have no doubt, is very imperious; but Conveyancers may often, by judicious firmness, prevent expression being given in a deed to feelings so unnatural, and which generally inflict much discredit on their author. You will find some very judicious remarks on this point by Mr. Christopher Douglas, W.S., in a letter to a testator, quoted in the case of Scott.³

¹ See Reid, 5th March 1813, F. C.;
and Fraser, 18th July 1849, 11 D. 1466.

² Ivory's Erskine, p. 694.

³ Scott, 8th Feb. 1864, 2 Macph. 613.

RESTRAINTS ON
THE LIBERTY OF
THE PERSON.

Restraints on the liberty of the person were, in older times, partially allowed; but the last vestige of them was done away by the Acts relative to labourers astricted to coal and salt works.¹ That curious chapter in the social arrangements of this country is now happily a matter of history. The Court had long previously refused to extend to fishermen the law regarding colliers and salters.²

Restraints on the ordinary privileges of the subject are to a certain extent allowable; but the assumption of exclusive rights by parties or associations who have no corporate monopolies, is illegal.³ It not unfrequently, however, has happened that one, entering the service of another, is required to restrain himself from carrying on the particular trade of his master, within a specified district, for the purpose of preventing future rivalry or competition. On this subject Professor Bell says,⁴—(1.) A general restraint extending to the whole country is void, whether with or without consideration given, on the ground of injury both to the individual sought to be restrained and to the public, who may thereby be deprived of a useful member; (2.) Particular restraints are effectual, on the principle that a man may, by his own consent, give over his business, or part with it to another, in a particular place; and he refers to the English case of Mitchell in support of this view. On this principle, agreements have been sustained, restraining one of the parties from particular trades within the same parish, or within half a mile, or within ten miles, or within the same city.⁵ The case of Davis was that of an assistant to a country surgeon. In Stalker's case, two persons entered into a copartnership of bookselling in Glasgow, to continue for three years, and, because (as the report says) the place was judged too narrow for two booksellers at a time, it was stipulated, 'That, after the expiry of the three years, either of them refusing to enter into a new contract upon the former terms should be debarred from any concern in bookselling within the city of Glasgow.' In a reduction of the contract, the Lords found the debarring clause in the contract a lawful paction, and not contrary to the common liberty of the subject. The same principle was allowed effect in a recent case.⁶

FREEDOM OF
ELECTION TO
OFFICES OR
PLACES OF
TRUST.

Contracts, or stipulations, which interfere with the freedom of election to offices or places of trust, are void at Common Law. In these cases, as in the others we were lately considering, the rule '*Melior est conditio possidentis*' equally holds.

A person to whom money was paid, to be employed in bribery with reference to an election, was found not liable to be called to account in

¹ 15 Geo. III. c. 28, and 39 Geo. III. c. 56; 13th June 1799.

² Allan, Dec. 1728, M. 9454.

³ Weavers of Glasgow, 17th Dec. 1734, Elch. *Pactum Illicitum*, No. 2; and Brown's Synopsis, iii. 1434; and Young, 21st Dec. 1765, M. 9564.

⁴ Bell's Commentaries, i. 302.

⁵ Mitchell's case; Chesman & Davis, Bell's Commentaries, i. 302; Stalker, 15th Jan. 1735, M. 9455 & 16,427; and Elch. *Pactum Illicitum*, No. 3.

⁶ Watson, 14th July 1863, 1 Macph. 1110.

Court by the party who had given him the money, or his trustees.¹ A bond of annuity granted as a bribe to secure a vote in the election of a Member of Parliament will not sustain action at the instance of the original holder.² Corrupt practices in procuring votes will vitiate the election of the trustee in a sequestration, and render him ineligible for re-election by the creditors.³

The buying and selling offices of public trust or employment is most obnoxious to the Law, as it is matter of public concern that such offices shall always be filled by the persons best qualified to perform their functions, without regard to any other consideration. This is stated, with great clearness and force, as the principle of the Common Law, by the Lord Chancellor in the case of Stewart;⁴ and again by the Lord President Hope in the case of Thomson, after referred to. We have now, however, to a large extent, the benefit of express enactment on this subject. By the English Statute, 5 & 6 Edward VI. cap. 16, extended to Scotland by 49 Geo. III. cap. 126, a person buying or selling offices connected with the administration or execution of justice, and in various other public departments, or buying or selling deputations, was made to forfeit his right; and all agreements in relation to such buying or selling were declared void to and against the parties.

BUYING AND
SELLING OFFICES
OF PUBLIC
TRUST.

The above Act of George III. applied likewise to all offices in the Crown's gift or appointment; all commissions, civil or military; and to all places, employments, and deputations to offices in the department of the Treasury, Secretary of State, Admiralty, Excise, and others of public trust. Both Acts except from their operation heritable offices, keeperships of parks, or the like; and the Act of George III. excepts also offices legally saleable, and various others.

The existence of these Acts renders it unnecessary to enter into any examination of such cases as that of Stewart, which had reference to a private agreement for division of the fees of the office of Depute-clerk to the Bills, that is, in certain cases of summary application to the Court of Session by petition, or, as it is called, bill. The agreement had been partly sustained, partly disallowed, in the Court of Session, whose judgment, so far as it disallowed the agreement, was affirmed; so far as it sustained the agreement, no appeal had been entered, but the House of Lords indicated a strong opinion that the transaction was illegal, and they would probably have found the old law sufficient to annul it, if the question had been before them for judgment.

The Common Law, however, rightly goes further than the Statutes, reprobating all transactions by which the proper administration of an office is put in peril, by withdrawing from the person actually performing the duties an undue portion of the emoluments allowed him by law for so doing.

The Magistrates of Edinburgh have, alternately with the Court of

¹ Campbell, 28th Nov. 1778, M. 9530.

² Glen, 15th Jan. 1822, 1 Sh. 234.

³ Mann, 1st July 1857, 19 D. 942.

⁴ Stewart, 25th Feb. 1802, 4 Paton, 286.

Session, the patronage of the office of Joint-keepers of the Parliament House; and, upon a vacancy which occurred in 1808, the Magistrates got one of the candidates to withdraw, and the other to engage that if appointed he should make payment of a life-annuity to the withdrawing candidate and his wife. The Court found the obligation for the annuity an illegal transaction, and not actionable.¹ The same principle was allowed effect in another case,² relative to an appointment to the office of macer of the Court of Session, granted by a private individual, in virtue of a heritable right of patronage. An attempt was afterwards made by the patron in that case to reduce the appointment of the macer, on the ground of his having refused to fulfil the conditions on which he got it, but the Court unanimously dismissed the action.³ A decision which cannot be reconciled with the above was given in the case of Haldane,⁴ where one of two extractors of the acts and decreets of the Court of Session having fallen into bad health, the other agreed with him to do the duties of both, and allow him, and in the event of his death his family, a share of the profits. The Court unanimously sustained the contract. The ground of this decision appears to have been, that the stipulations in favour of the one party and his family had no influence in procuring the other's appointment. But, in a subsequent case,⁵ an agreement between a Depute and Assistant Clerk of Session—whereby, the former being disabled from age and infirmity, the latter agreed, for a certain consideration, to perform the whole duties of both—was found illegal. And the opinions of the Court, at pronouncing judgment, appear to render Haldane's case no longer an authority. In particular, Lords Mackenzie and Jeffrey lay down as a principle, that the public must be presumed to suffer when they get the services of only one person, being entitled to those of two. These cases relate to judicial offices, and the same rule will apply to administrative.⁶ The cases here noted both related to the office of Keeper of the Register of Sasines in Glasgow. In Paul's case a general conveyance by the Keeper to a trustee for his creditors of all estate, heritable and moveable, belonging to him, was found not to include the fees and emoluments of the above office, of which, under a private family arrangement, he was not in the beneficial possession until long after the date of his trust-deed. In Ord's case, an agreement, whereby the office was declared to be held in trust for another party than the Keeper, and to whom the Keeper was bound to pay over the emoluments, under deduction of a specific sum for trouble, was found illegal.

It is not, however, to be understood that there is no purpose to which a part of the emoluments of an office can be assigned. This is a very important practical point. In Ord's case, Lord Fullerton says, 'In many cases of that kind, the transaction may in itself involve no impropriety or illicit consideration. When a party appointed to an office, and

¹ Thomson, 16th Feb. 1811, F. C.

² Gardner, 11th March 1835, 13 Sh. 664.

³ Bruce, 27th Feb. 1839, 1 D. 583.

⁴ Haldane, 6th March 1812, F. C.

⁵ Mason, 28th Nov. 1844, 7 D. 160.

⁶ See Paul, 15th Nov. 1838, 1 D. 27; as reversed, 6th Oct. 1841, 2 Robinson, 524; and Ord, 21st May 1847, 9 D. 1118.

'entitled to its emoluments, agrees, in consideration of an advance of money, or in payment of a lawful debt, or for any other consideration in itself legal, to assign the whole or part of the emoluments of the office, the transaction itself stands clear of any objection, and the only ground for refusing effect to it is the supposed inexpediency of separating the duties of the office from the emoluments, and the consequent interest on the part of the public, that the emoluments thus held to be essential to the due and effective discharge of the duties shall not be alienable to a third party.'

Under the exceptions noticed by Lord Fullerton, is the case in which parties holding offices, and becoming insolvent, when suing out the process of *cessio bonorum*, are usually ordained by the Court to assign a portion of the emoluments of their office to their creditors; and it appears, from Lord Jeffrey's opinion in Ord's case, that in analogous cases in England, in regard to Government officials, reference is in use to be made to the head of the department, to ascertain how much of the emoluments is required to be left, as salary for the due discharge of the office, the creditors or their trustee taking the balance or reversion. This has no doubt suggested the provision in sect. 149 of the Scotch Bankrupt Act,¹ by which the Lord Ordinary or Sheriff, in a sequestration, may order such portion of the pay, half-pay, emoluments, or pension of any bankrupt, as the Secretary at War, or other Chief Officer of Department in the Government, or the Directors of the East India Company, may consent to, to be paid to the trustee for the creditors. So far, therefore, this matter is now under regulation, and it is probable that the principle adopted in sequestrations will be followed in other cases; but only for behoof of creditors, not as matter of mere private arrangement between parties. The distinction between these classes of cases is thus stated by Lord Mackenzie in Ord's case, 'What is paid to a man's creditors is paid to himself.' 'The payment to a third party does the party no good whatever; whereas, if the creditors do not get the surplus salary, in the case of *cessio* the man is put in jail, so, by getting his discharge, he pays to himself.' It is, however, in all cases matter of public interest that the party who is to administer any office shall receive what is necessary for the efficient discharge of its duties; and the Court will not sanction any private assignation which interferes with the fair operation of that principle. The above clause does not extend to the case of the pension of the clerk of a deceased Judge of the Court of Session. Such pension is payable by the Lords of the Treasury, in consequence of their having had made over to them a special fund out of which the pensions to Judges' clerks were formerly payable; and the above clause in the Bankrupt Act does not apply to the Lords of the Treasury, or authorize the trustee in such clerk's sequestration to obtain from the Treasury an order for payment to him, for behoof of the creditors, of a portion of the pension.² The Judge's clerk, moreover, is not

¹ 19 & 20 Vict. c. 79.

² *Latta*, 18th July 1857, 19 D. 1107.

the servant of the Lords of the Treasury, nor subject to them, nor in their department.

SIMONY.

Simoniacal contracts are void at Common Law, as *ob turpem causam et contra bonos mores*. An obligation, by the friends of one of two candidates, for the presentation as minister of a parish church, to the heritors of the parish (who were not the patrons) to allow a year's vacant stipend for kirk purposes, in consideration of their friend receiving the presentation, is not actionable.¹ A patron, who had intended to give the presentation to a vacant parish to a distant relative, was induced to select another presentee, on condition, *inter alia*, of obtaining an obligation for an annuity to his own relation from the presentee's father. The presentee was not implicated; his father refused to pay the annuity and was found not liable, but the Court fined both him and the patron for behoof of the poor.² An obligation by a minister not to ask for any augmentation of glebe or stipend is not binding.³ Neither is an obligation by a minister to the heritors, that, on their withdrawing opposition to an augmentation applied for, he shall not ask another during his incumbency.⁴ A parish schoolmaster holds his office *ad vitam aut culpam*; and an admission, taken from him by the heritors, that he held at pleasure, is unlawful, and gives the heritors no right to remove him.⁵ In Duff's case, it was observed by the Court, that, though heritors cannot effectually stipulate that a parish schoolmaster shall be removed at their pleasure, they are not precluded from taking a teacher for a few months on trial. It has been held not illegal for the heritors, on the death of a parish schoolmaster, to agree with the shareholders of an academy, founded by private subscription, to abstain from filling up the vacancy, and to pay their proportions of school-salary into the hands of the trustees of the academy, to be employed in the purposes of that institution; the agreement being qualified by a power to resile, in case any one having a legal title should call a statutory meeting of heritors, for the election of a parochial schoolmaster in ordinary form.⁶ This was a very special case, and I refer to it rather as pointing out what appears to have been a sensible arrangement in the circumstances, than as illustrating any legal principle.

Where a bursary, by the deed of mortification, was destined to be held for nine years, and a presentation by the patron bore, *ex facie*, to be granted on the express condition that the presentee should resign whenever called upon by the patron to do so, Lord Kinloch held that this was an unlawful condition, which could not be held *pro non adjecto*; but was an essential vitiation of the presentation. No judgment on this point was pronounced by the Court.⁷

¹ Steven, 20th Feb. 1759, M. 9578.

² Maxwell, 19th Jan. 1775, M. 9580.

³ Boyd, 22d Jan. 1794, M. 9583.

⁴ Kellie, 9th March 1803, M. 15,710.

⁵ Duff, 20th Feb. 1799, M. 9576.

⁶ Davidson, 27th Feb. 1850, 12 D. 789.

⁷ Ramsay, 20th July 1859, 21 D. 1367.

Stipulations, in opposition to the arrangements made by the Revenue laws, or in contravention of these laws, are not entitled to effect. By the Act imposing the Income Tax,¹ parties liable in payment of interest, rent, or other annual payments, are declared entitled to deduct or retain the tax from the sums payable by them; and all contracts made, or to be made, 'for payment of any interest, rent, or other annual payment, in full, without allowing such deduction,' are declared utterly void. This provision is re-enacted by the Act 16 & 17 Vict. cap. 34, sect. 5; and the stipulation contained in a marriage-contract, that an annuity was granted to a wife 'exempted from all burdens and deductions whatsoever,' was held void by these Acts, as far as it related to the Income Tax. The debtor was accordingly found entitled to deduct the tax from the annuity.²

STIPULATIONS
IN OPPOSITION
TO REVENUE
LAWS.

I now notice contracts relative to contraband of trade, or smuggling, the general rule as to which is, that no action is maintainable on the contract, or for the price of the goods purchased. The maxim still is, '*Melior est conditio possidentis vel defendentis.*'

SMUGGLING.

As regards contracts made in this country, the rule is clear and without exception. The parties cannot recover on such contracts.³ This rule strikes also against foreigners accessory to the smuggling, their accession being matter of fact to be proved. It is good also against the assignee to a debt incurred to the foreigner accessory to the smuggling, on account of the price of smuggled goods; and the right of such assignee will not be saved though he holds a heritable bond for the debt, and is infert on it; because the assignee to an ordinary debt is liable to all the exceptions pleadable against the cedent. The heritable bond and infertment will not vary the case, for, though such bond and infertment would give a preference in an ordinary case, and bar any personal exception against the security, they do not bar exceptions against the debt secured.⁴

In contracts made abroad for the sale of smuggled goods, where the seller is a foreign merchant, and is not accessory to the breach of our laws, action is allowed to such foreign merchant for the price of the goods, even if he knows that the goods are to be smuggled into this country, provided he has no concern himself with the smuggling scheme. The contract of sale is legally made abroad. It is completed by delivery abroad, and our laws are not offended by it. They therefore allow the claim for the price;⁵ and action is allowed in similar cases to a native of this country settled abroad, if he has acted simply as a seller, even though he suspected, or indeed knew, that the goods were meant to be smuggled into England.⁶ There are numerous cases to this effect. The same was found as to a Scotchman settled in the Isle of

¹ 5 & 6 Vict. c. 35, s. 103.

² Blair, 17th Nov. 1858, 21 D. 15.

³ Nisbet's Trustee; Bell's Octavo Cases (1791), 349; and Lord Kenyon, in English Case of Biggs, there cited.

⁴ Nisbet's Case.

⁵ Holman v. Johnson, Cowper, 341, cited in Bell's Comm. i. 307. See Lord Mansfield's exposition of the law as there reported.

⁶ Cullen & Co., 15th May 1793, M. 9554.

Man.¹ In these cases the law to be looked to is that of the country where the contract was made.

As to transactions entered into after the goods have come into this country, there is a difference between the case of goods actually prohibited and other smuggled goods. No *bona fides* will support the contract if the goods are absolutely prohibited.² Every one must know that it is unlawful to deal in prohibited goods, and action is no more competent against the cautioner for the purchaser of such goods than against the purchaser himself.³ But after the goods, not being prohibited, are in circulation in this country, the *bona fide* seller has action for the price, though the goods, having been smuggled into this country, shall be seized for non-payment of the duties.⁴ Bills for the price of contraband goods, however, whilst in the hands of original parties, will not authorize action.⁵ Nor will they allow action, though in the hands of an onerous indorsee, if acquired by him when overdue.⁶

GAMING.

The Act 1621, cap. 14, 'anent playing at cards and dice, and horse-races,' which was passed to restrain excess in play, appointed the surplus above 100 merks, won at cards or dice, within the space of twenty-four hours, or at horse-races, to be consigned within twenty-fours therefrom for behoof of the poor of the parish where the winning took place. This Act was found not to be in desuetude as to a horse-race in the case of Maxwell,⁷ and in a sequel to the same case;⁸ the money won upon the race was found to belong to the poor of the parish where the bet was laid.

The Act of 9 Anne, cap. 14, is much more broad and stringent; enacting 'that all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever,' where the whole or any part of the consideration consisted of money won at play, or lent at the time to play with, shall be 'utterly void.' This Act was put in force against a party holding a bond as trustee for the winner of money at play;⁹ and against the grantee in a bill, a portion of which was for money lost at play, the remainder for furnishings; reserving the right of ordinary action for the furnishings;¹⁰ and, after a contrary practice, full effect has been allowed to this Act against onerous *bona fide* holders of bills.¹¹ Again, the plea of *vitium reale* was sustained against the onerous indorsee of a bill for a gaming debt; Lord Cringletie saying, 'such a bill is just a piece of waste paper.'¹² But, in respect of the hardship and injustice arising to *bona fide* third parties from the former state of the law, the Act 5 & 6 Will. IV. cap. 41, repeals so much of the Act of Queen Anne as annuls

¹ Crawford, 5th December 1765, 5 Br. Sup. 914.

² M'Master, 2d March 1775, 5 Br. Sup. 530.

³ Sibbald, 27th July 1779, 5 Br. Sup. 532.

⁴ M'Lean, 5th December 1788, M. 9549.

⁵ Duncan, 8th Feb. 1776, M. 9546.

⁶ Mercantile Law Amendment Act, 19 & 20 Vict. c. 60, s. 16.

⁷ Maxwell, 14th July 1774, M. 9522.

⁸ Kirk-Session of Dumfries, 15th June 1775, M. 10,580.

⁹ Pringle, 7th Nov. 1740, M. 9509.

¹⁰ M'Coull, 5th March 1767, M. 9518.

¹¹ Laidlaw, 9th June 1801; Hume, 45.

¹² Hamilton, 18th May 1832, 10 Sh. 549.

any note, bill, or mortgage; and every note, bill, or mortgage, which but for this last Act would have been absolutely void, is to be held as granted for an illegal consideration. If, therefore, the granter shall actually pay to any indorsee, holder, or assignee, the amount thereby secured, the money so paid shall be held as paid for the original grantee of the note, bill, or mortgage, and shall be recoverable from him as an ordinary debt.

In the case of notes, bills, or mortgages, the law is thus now altered to the above effect, as far as regards onerous *bond fide* third parties. The alteration made is not expressly applicable to simple bonds, not being mortgages; and though on principle the holders of bills and bonds are precisely in the same case, this distinction ought to be kept in view. Probably the term 'mortgage' may be held as including a bond and disposition in security. But, whether as regards bonds, bills, or mortgages, the safe practical rule is to have nothing to do with them, whenever they seem exposed to the taint of a game debt.

In Scotland, and by the Common Law, wagers are not actionable.¹ In *WAGERS*. Wordsworth's case it was observed, that Courts were instituted to enforce the rights of parties arising from serious transactions, and can pay no regard to *sponsiones ludicra*.² We are, however, to distinguish between the cases noted and that of Graham,³ where the prize at a coursing match had been won by a dog belonging to Gibson, but named for the match by Pollock. There was no dispute as to the winning dog; a question on that point would have fallen under the head of *sponsio ludicra*; but a question was raised, whether the prize belonged to the owner of the dog, or to the party who had named the dog, and the Court held that question to be one of patrimonial right and lawful contract, and cognizable by the Court only. The opinions delivered at advising this case show fully the distinctive principles on which it was held appropriate to a Court of law.

Wagers connected with the price of the public funds are null by the Act 7 Geo. II. cap. 8; made perpetual by 10 Geo. II. cap. 8; and these Acts were held to reach a transaction by which, in consideration of time being allowed for payment of part of the price of a house, the purchaser agreed, at the expiry of such time, in the seller's option, either to pay the money balance, or a sum equal to the quantity of Government stock which such balance would have bought at the date of the purchase. There was likewise an usurious condition (then unlawful) in the bargain, on which account, and also in respect of the Act, the transaction was annulled.⁴

We have a late Act in reference to gaming and wagering.⁵ But when a single individual employs a broker to buy and sell shares of stocks,

¹ Bruce, 26th Jan. 1787, M. 9523; affirmed 14th April 1788, 3 Paton, 107; Wordsworth, 15th May 1799, M. 9524.

² See also Gordon, 16th Nov. 1804, M. App. *Pactum Illicitum*, No. 3.

³ Graham, 1st Feb. 1848, 10 D. 646.

⁴ Scott, 14th May 1800, M. App. *Pactum Illicitum*, No. 2.

⁵ 8 & 9 Vict. c. 109.

neither possessing the shares which he instructed his broker to sell nor intending to take up the shares which he instructed his broker to buy, but merely speculating on rises and falls in the market, and hoping to settle by payment, on receipt of differences; this is not gaming or wagering in the sense of the above Act. It is held necessary, in order to constitute gaming and wagering in the sense of the Act, that there shall be two parties opposed to each other, each intending that the transactions shall be fictitious, and neither of them bound to deliver or accept the shares.¹ The question was raised, but not settled, in Foulds' case, whether the above Act of Victoria extends to Scotland.

USURY.

The laws against usury, that is, against taking or stipulating for interest on the loan or use of money at a rate higher than was allowed by Act of Parliament, are all now abolished by the Act 17 & 18 Vict. cap. 90, passed on 10th August 1854; in a schedule annexed to which a list of the former laws on this subject will be found. It is accordingly now competent to stipulate in any bond or contract for whatever rate of interest the parties may agree upon. But the Statute has no retrospective effect; on the contrary, by sect. 2, it is declared not to prejudice or affect the rights or remedies, or diminish or alter the liabilities, of any person in respect of any act previously done.

It is, therefore, necessary to keep the previous state of the law in view. Some notices of the older laws will naturally be suggested by the terms of the moveable or personal bond when we are treating of it. But it would be out of place here to go at any length into the general subject of the usury laws, whose chief interest now consists in the lesson they teach, that even stringent and oft-repeated enactments, if contrary to justice and sound policy, will, by some means or other, be largely evaded by those whom principally they were intended to restrain. The recent Act, however, did not alter then existing contracts, express or implied, in reference to interest; and, in terms of sect. 3, the same interest as was then payable under such contracts was to be recoverable as if the Act had not passed. The rate of interest, being no longer fixed by Act of Parliament, should be made matter of express stipulation in all money transactions involving liability to pay interest. But it is important to keep in view that, with reference to heritable securities, for what are familiarly known as cash credits, the Act, sect. 7, expressly restricts the sum to be secured (as formerly) to the amount of the principal sum of the credit, and three years' interest thereon at five per cent. Whatever, therefore, may be the rate of interest actually chargeable in such cases, the heritable security will reach only the principal sum, and three years' interest at the old legal rate of five per cent.

PACTUM DE HÆREDITATE VIVENTIS.

Under the Roman law, the sale of an expected inheritance—the *Pactum Corvinum super hæreditate viventis*—was void. But contracts of

¹ Foulds, 10th June 1857, 19 D. 803.

that nature are lawful amongst us,¹ and they are by no means rare. Indeed they are frequently conducive to the best interests of the parties, to whom a future inheritance can never make up for the want of present means of education, or it may be of maintenance. Probably this is the most expensive way in which to create a capital fund for present purposes, or an income; yet, as such matters are now understood and arranged, through the medium of an insurance company, the exactions, though heavy, cannot be unfairly rigorous.

For illustrating the law and practice on this point, it seems enough to notice the case of Buchan,² where the Court expressly sanctioned the sale by tutors of a portion of their pupil's expected inheritance, in consideration of a present advance of money, to pay debts, and of a temporary annuity for the child's subsistence and education; and the case of M'Kirdy,³ in which the Court unanimously sustained the sale, at one year's purchase, of the contingent right of succession of an heir of entail to his nephew in lands yielding between £500 and £600 yearly of rent. The consideration, as the case turned out, was very inadequate, but it might have been altogether different; and, in point of fact, the succession, which had been sold, did not become available for eleven years after the purchase, when the heir in possession met with an accidental death, and there was not the slightest ground for alleging facility, fraud, or circumvention. The decision settled incontestably that such transactions, though apparently not allowed in England, except to the effect of enabling the purchaser to reimburse his outlay, are lawful in Scotland. In particular circumstances, no doubt, they would be looked on unfavourably, so that great care should be exercised in conducting them. M'Kirdy's case will suggest a variety of cautions. But, though voluntary rights can be granted by an heir-presumptive to affect his contingent succession, he has only a *spes successionis*; and has no such right as is capable of being adjudged by his creditor. The adjudication of a *spes successionis* is incompetent.⁴

Agents cannot purchase the estate of their constituents, or debts due by their constituents; neither can trustees buy lands which they themselves are selling. The interests of the buyer and seller being absolutely adverse to each other, no one, whose business and duty it is in an official capacity to sell, can, in his private capacity, purchase the subject which he is selling. He is bound, as acting for the seller, to obtain the best price he can; and that obligation precludes him from purchasing, or being interested in the purchase. On this principle, the factor for a pupil, who had acquired for his own benefit rights affecting the pupil's estate, was found liable to communicate the benefit thereof to the pupil.⁵

PURCHASE BY
AGENTS OR
TRUSTEES.

¹ Stair, i. 10. 8, & iii. 8. 28; Erskine, iii. 3. 84.

² Buchan, 16th Dec. 1837, 16 Sh. 238; and 7th March 1839, 1 D. 637.

³ M'Kirdy, 31st May 1839, 1 D. 855.

⁴ Beaton, 7th June 1821, 1 Sh. 49.

⁵ Lord Ludquhairn, 28th March 1632, M. 9503.

A factor is bound to communicate an abatement from the nominal sum due, allowed at the settlement of a debt; and it was found that a clause in a factory, giving liberty to the factor to purchase in claims against his constituent, for his own behoof, was *contra bonos mores*, and void in law.¹ The same principle was given effect to in the case of an interdictor,² and of the trustee in a private trust.³ In the case of Wright's Trustees, the trustee under a private trust, who had acquired a debt affecting the trust-estate, was obliged to give the benefit of the purchase to the estate. In another case,⁴ law-agents, who were also their client's trust-assignees, factors, and interdictors, had bought subjects over which their client had a debt, heritably secured. The debt was not paid off in cash, but allowed for in account; and, at the distance of more than thirty years from the time of the purchase, it was held that the agents had bought for their constituent, and were bound to make over the subjects to him.

The common agent appointed to act for behoof of all concerned in a process of sale of an estate, and of ranking the creditors on the price, cannot himself buy the lands when exposed to sale. He is a *quasi* trustee, and bound to get the highest price he can in the sale; and he is not entitled to place himself in a situation where he can use, exclusively for his personal benefit, information as to the value and capabilities of an estate, or any other information, to the benefit of which the parties for whom he is acting as agent are entitled.⁵ The director of a bank, in course of being wound up, and who was one of the parties appointed to superintend the winding up, and also the law-agent of the bank, is not entitled to buy the outstanding debts of the concern. He also is a trustee.⁶ A heritable creditor, selling under a bond and disposition in security, is not entitled to be himself the purchaser. In the character of seller, he is a trustee for all concerned, and so is excluded, as having an adverse interest to the purchaser.⁷ The director of a public company is not entitled to enter, as an individual, into contracts with the company. In the character of director, he is trustee, and has an interest adverse to a contractor's; and it is no answer to say that he gave terms as favourable as others, or even more favourable than others. The Court will not discuss any averment on that point, but will hold the director absolutely excluded from contracting.⁸ And under the Bankrupt Act,⁹ when estate is sold publicly, by virtue of the Act, the trustee or commissioners, or adjudger selling, is not entitled to purchase. A similar clause, under the immediately prior Bankrupt Act, was enforced in a case where

¹ Murray, 16th June 1710, M. 9504; Corsan, 15th Jan. 1736, M. 9504.

² Campbell, 5th Feb. 1761, M. 7156.

³ Wright, 24th June 1712, M. 16,193; and Wright's Trustees, 8th March 1839, 1 D. 668; as reversed, 2d August 1842, 1 Bell's App. 574.

⁴ Gillies, 11th Feb. 1846, 8 D. 487.

⁵ York Buildings Co., 8th March 1793,

M. 13, 367; as reversed, 13th May 1795, 3 Paton, 378.

⁶ Thorburn, 8th July 1853, 15 D. 845.

⁷ Taylor, 20th Jan. 1846, 8 D. 400.

⁸ Aberdeen Railway Co., 19th Nov. 1851, 14 D. 66, and 20th July 1854, 1 M'Queen, 461. This is a leading case.

⁹ 19 & 20 Vict. c. 79, s. 120.

the trustee made the purchase through a third party, in name of his son, who was a minor, and without visible means, but truly for himself.¹ But the Act allows any creditor to purchase at the public sale of the estate.

The counsel who signs formal petitions relative to a sale, under the Acts for redemption of the Land Tax, is not incapacitated from purchasing.² An accountant who had been employed to examine and report upon the affairs of a bankrupt estate, was held not thereby disqualified from becoming purchaser of part of the estate.³ And in the case of Maxwell,⁴ heritable creditors, selling the subject of their security under warrant obtained before the Sheriff, became themselves the purchasers at a public roup, and were allowed to hold; because, on the debtor objecting, they offered to give up their purchase to him, and he declined to accept.

It is stated by Sugden⁵ (Lord St. Leonards), that in England, if a mortgagee, at whose suit a sale is being conducted under the authority of a Court of Equity, is allowed to bid for the estate, he will not be permitted to conduct the sale, and that no party to a suit can bid for an estate sold without the authority of the Court. Our proceedings, in the case of sale under a heritable bond, do not afford any opportunities for arrangements of this nature. And, as the law stands, Maxwell's case does not hold out any inducement to parties similarly situated to follow the example there set. It is best for the heritable creditor to maintain the character of creditor throughout,—to sell when he can find a totally unconcerned third party to purchase, and then to be done with it.

The buying of lands, etc., which are the subject of depending process, is, by the Act 1594, cap. 220, prohibited to the Lords of Session, Advocates, Writers to the Signet, their servants, or to any members of the College of Justice, or of any Inferior Court, directly or indirectly, under pain of forfeiture of their office. This Act does not apply to the case of a member of the College of Justice acquiring a claim, which afterwards formed the ground of an action at his instance, the action not having been raised before the acquisition of the claim.⁶ Nor is a summons, executed but never called, a process, within the meaning of the Act.⁷ And the Act does not prevent a member of the College of Justice from obtaining right to a process by gift or disposition;⁸ nor from taking an assignation to a final decret when the process is concluded.⁹ Nor does it apply to an assignation granted to an agent, who is to conduct a future process, in security of advances to be made by him for aliment to his client and expenses of process.¹⁰ The Act, moreover, has not been inter-

BUYING THE
SUBJECT OF A
DEPENDING
PROCESS.

¹ Brown, 23d Dec. 1838, 11 D. 338.

² Wemyss, 25th Feb. 1824, 2 Sh. App. 1.

³ Smith, 10th Feb. 1826, 4 Sh. 442.

⁴ Maxwell, 21st Jan. 1823, 2 Sh. 130.

⁵ Sugden on the Law of Vendors and Purchasers of Estates, p. 52.

⁶ Mowat, 6th July 1625, M. 9496.

⁷ Richardson, 30th July 1635, M. 9496 & 3210.

⁸ Hume, 30th July 1678, M. 9498.

⁹ Ruthven, 23d June 1680, M. 9499.

¹⁰ Forbes, 30th July 1774, 5 Br. Sup. 530.

puted so as, besides inferring deprivation of office to the purchaser, to annul the prohibited sales.¹

PACTUM DE
QUOTA LITIS.

The *Pactum de quota litis* is a bargain between an advocate or law-agent and his client; or a promise by the client, whereby the counsel or agent is to receive, in or towards remuneration of his professional services, a share of the subject about which there is a suit. Such bargain is unlawful, both at Common Law² and according to the spirit of the Statute of 1594, above referred to; 'in order,' as Stair says, 'to prevent the stirring up, and too much eagerness in pleas;' and likewise, as stated in other authorities, to prevent agents from taking advantage of their superior knowledge of the probabilities of causes, and inducing ignorant clients to make improvident bargains. But the pactions struck at are such as are made before or during the lawsuit, not after it is concluded.³ This plea was put in force in a case⁴ where the contract, giving the agent an interest in the process he was to conduct, was declared void, and the agent for a time suspended; the Lords proceeding to no higher punishment, in respect he acknowledged his fault, and it appeared he erred through ignorance, and not with any criminal design; and a similar contract was set aside in the case of Johnston,⁵ reserving to the agent to claim a suitable remuneration for his trouble. But the Act does not strike at such contracts when made by a mercantile house, and not by a law-agent.⁶

I may here notice, that the Court will not sanction an agreement between agents, practising in the Supreme and Inferior Courts respectively, whereby the one is to employ the other, and to participate in the fees properly falling to such other.⁷ Nor will the Court sanction an agreement between a law-agent and a messenger-at-arms, by which the latter is to exercise his office, for payment of a fixed salary, the law-agent drawing the fees. A messenger-at-arms is a public officer, and bound to serve all the lieges, and such an agreement would interfere with his liberty of action. He also acts judicially in poindings, and ought not to be the dependant of any one.⁸

The question of conducting a process gratuitously, or for less than the usual professional remuneration, has been occasionally remarked on by the Court; and, though it is to be regarded with disfavour, there are cases in which it may be becoming and proper so to act. In a case where, apparently, there was no proper excuse for such an arrangement, the Court unanimously expressed themselves unfavourably to an engagement by an agent, to conduct a process about to be commenced, upon being paid only his actual outlay, but, if successful, or if the client

¹ Colt, M. 9495; see also Sir P. Home, 15th Dec. 1713, M. 9502.

² Stair, i. 10. 8.

³ Hume, 24th Feb. 1675, M. 9496.

⁴ Mackenzie, 23d July 1774, 5 Br. Sup. 528.

⁵ Johnston, 1st Feb. 1831, 9 Sh. 364.

⁶ Rucker, 9th Feb. 1826, 4 Sh. 438.

⁷ Brashe, 9th March 1820, F. C.; and A. R., 12th May 1832, 10 Sh. 523.

⁸ Henderson, 20th Dec. 1832, 11 Sh. 225.

should effect a compromise, he was to have his whole account.¹ But where an agent had committed a blunder, in conducting a criminal prosecution, the Court sustained an agreement (proceeding on his offer) to conduct a new prosecution, and to 'charge nothing therefor, except mere outlays, should we not succeed.' The prosecution failed, whereupon he claimed his full expenses, as in ordinary circumstances, but the Court gave effect to the agreement, as made in fact by way of reparation for an injury done.² And again, Lord Gillies, in Clyne's case, speaks thus: 'It may happen, that a case occurs, where, from motives of charity, or generous delicacy, an agent may offer his services to a man, whose rank in life is incompatible with an application for the benefit of the poor's-roll, while his misfortunes may have disabled him from seeking redress in this Court without some friendly assistance. An agent who offers to act for such a party, and stipulates that, in the event of failure, he will ask no remuneration beyond his actual outlay, does not derogate from what is becoming in professional men of the highest respectability in this Court.' You will observe, however, that Lord Gillies sanctions only the conduct of a case without remuneration, in the special circumstances he states; in no respect the acceptance of more than professional remuneration in any case.

It is to be noticed also, that an agent who enters into an agreement, in itself unlawful, in reference to his professional charges, is not entitled after the agreement has been acted on, to plead for his own benefit that it is illegal, and to claim as if there had been no agreement.³ Parties who had employed an agent in the Court of Session, to conduct legal proceedings, were found not entitled to found on an agreement by that agent, to communicate half of his profits to another agent; but the agent employed by them was ordained (in terms of his own judicial offer) to find security for any claim against them at the instance of the other agent.⁴

I shall here request your attention to several professional cases which are instructive, and do not belong to any of the particular classes we have been treating of.

MISCELLANEOUS
PROFESSIONAL
CASES.

1. The case of Long,⁵ where a debt due by the York Buildings Company, which, at one time, was considered desperate, was recovered to an amount exceeding £1000; and the agent having reported this to his constituent, who resided in England, and requested to know what would be allowed him for having realized so large a part of the debt, and incurred so much risk, trouble, and expense, the constituent agreed to accept £500, and allow the agent to keep the remainder. The agent had incurred no risk, and his account for business, which he had not rendered, amounted to only £18. In these circumstances, the agent's representatives were found liable to the constituent in the balance of the debt. In this case, Lord

¹ Clyne, 26th Jan. 1830, 8 Sh. 391.

² Swanson, 14th June 1833, 11 Sh. 718.

³ Swanson's case; and Bolden, 27th Feb. 1850, 12 D. 798.

⁴ Pattison, 28th Nov. 1845, 18 Jurist, 88.

⁵ Long, 8th June 1821, 1 Sh. 57 affirmed, 4th June 1824, 2 Sh. App. 233.

Cringletie, Ordinary, expressed himself thus as to the duties and liabilities of agents, situated as the individual who here acted was. His Lordship says, 'Almost in every case between client and attorney, the latter being 'possessed of all the knowledge, both of the law and of the facts, and 'being, with this advantage, placed in a confidential situation, is in duty 'bound to make full disclosure of both to his constituent, to enable him 'to judge for himself in making a settlement of matters between them ; 'and, as a consequence of this, if the attorney be detected in the least 'misrepresentation of any material circumstance, he ought not to be 'suffered to derive the advantage of any settlement made under any such 'deception, further than a due recompense for his costs and trouble.' After quoting Lord Eldon's opinions, as to the necessity of strict accuracy in an agent's communications to his client, Lord Cringletie resumes, 'Principles 'ought to be adopted and established which lead to purity of manners 'in practitioners of the law ; and to maintain that consequent honourable 'respect with which they ought to be regarded by their country.'

2. The case of *Anstruther*,¹ where it was found that an obligation by a client to his agent, while the relation of agent and client still subsisted between them, for a sum of money as a gift, in addition to the ordinary business charges, was in the circumstances null, and it was reduced. The report of this case is very instructive.

3. The three cases of Lord Gray and others, Douglas, and Mackenzie.²

(1.) In the case of Lord Gray and others, a body of trustees, having the management of an estate which was entailed, subject to the operation of their trust, having found it necessary to apply for a private Act of Parliament to enlarge their powers, and for other purposes, employed a firm of law-agents in obtaining the Act, and afterwards in carrying it into execution, one of the trustees being a member of the firm. The trustees applied to the Court for an order for payment of the business account incurred to the law-agents. The heir of entail, primarily affected, entered appearance, and expressed his willingness that the account should be paid ; but the Court refused the application, excepting as regarded costs out of pocket. They however allowed interest at five per cent. on these costs, which would not have been chargeable along with ordinary professional remuneration.

(2.) In the case of Douglas, a factor *loco tutoris*, in submitting his accounts to the accountant of Court, credited himself with charges for necessary law business, executed for behoof of the pupil's estate, by a firm of law-agents, of which he was a partner. A decided majority of the whole Court, holding judicial factors to be trustees, and, therefore, to be subject to the rule that trustees cannot make profit by agency in the management of affairs committed to them, found the factor *loco tutoris* not entitled to his business charges, except to the extent of the costs out of pocket.

(3.) In the case of Mackenzie, a similar judgment was pronounced with reference to the curator *bonis* to a lunatic.

¹ *Anstruther*, 31st Jan. 1856, 18 D. 405.

² Lord Gray, Douglas, & Mackenzie, 12th Nov. 1856, 19 D. 1.

It is now, therefore, settled as a general rule, and apart from special circumstances, that a law-agent cannot act for himself as a trustee, or for a body of trustees of whom he is one, to the effect of making profit at the expense of the trust-estate with which he is officially connected; and the rule is the same when the business is conducted by a company of law-agents, of which one member is a trustee. The same principle has long been in operation in England. We also have an old case,¹ in which the Court of Session negatived the claim to remuneration made by trustees for creditors under a private trust; the Court finding 'that the trustees were not entitled in law to demand any reward for their pains.'

I observe that, in England, the rule has been applied to the case of a heritable creditor selling the subjects of his security through a company of auctioneers, of which he was a partner. The Court disallowed the auctioneers' charges. But, where the testator gave his trustees power to name agents and factors, either of their own number, or other fit persons, it was held, by a majority of the whole Court, that the trustees might employ a company of professional agents, of which one of their own number was a partner, and allow such company commission and law expenses, on the ground that the express permission to employ one of the trustees, as law-agent for the whole, implied that such employment was to be paid for as in ordinary cases.²

The rule disallowing professional charges does not apply to agents acting as tutors *ad litem* or curators *ad litem*.³ I have been informed that the late Lord Rutherford considered agents so acting as no more entitled to professional remuneration than those acting as trustees, or ordinary tutors or curators. But the Court appear to have allowed an agent, acting as tutor and curator *ad litem*, his expenses as matter of course, in a late case.⁴ Agents, when so acting, are of course peculiarly liable to be called on to show that they have acted with prudence and discretion. In Pirie's case, the account allowed to a tutor *ad litem* was objected to as arising from double agency; that is, it was alleged that the same business was knowingly done and charged for twice over by two separate agents; but the account was specially reported on as not so, and as moderately charged. In Moncreiffe's case, the Lord President McNeill said, 'It appeared proper, and indeed it was necessary with a view to expiscating this matter, and enabling the Court to proceed with the execution of the Act, that such an appointment' (that is, of tutor and curator *ad litem*) 'should be made. The appointment was made. The curator entered appearance, and a question was raised of considerable importance. It is necessary that the expenses of the curator so appointed (and it being in no respect alleged that he misconducted himself) should be provided for.'

¹ Veitch, 4th Jan. 1738, reported in 21 D. 1383.

² Goodsir, 19th June 1853, 20 D. 1141.

³ Robertson, 27th June 1849, 11 D. 1201; Pirie, 4th March 1851, 13 D. 841.

⁴ Moncreiffe, 19th July 1859, 21 D. 1359.

TITLE VI.

THE OPERATION OF ERROR, FRAUD, FORCE, AND FEAR, IN REFERENCE TO THE EXECUTION OF DEEDS.

CHAPTER I

IF the consent, which is indispensable to the constitution of an obligation or contract, be given by a party in unavoidable error as to essentials, or brought about through fraudulent means by the other party, the obligation or contract will be voidable at the instance of the party in error, or upon whom the fraud has been practised, though not so as to affect the rights of onerous *bonâ fide* third parties ; and, if a deed be extorted by the influence of force and fear, it is not the act of the person by whom it bears to be subscribed, and it will be voidable at his instance against all concerned.

ERROR. First, under this title, may be noticed Error, which, in order to authorize the reduction of a contract or obligation, must be *in substantialibus*. Stair says,¹ 'Those who err in the substantials of what is done, contract not.' Erskine says the same.² On the question, whether an error in point of law will authorize reduction, and whether the error must not, in order to such consequence, be in the fact, it is now settled that, where the reduction infers repayment of money, paid under error in point of law only, it cannot be sustained. The leading Scotch cases on this point are Wilson and M'Lellan,³ and Dixon.⁴ These cases related to money paid in error in point of law, and of which repayment was unsuccessfully sought. But this rule has been found not to extend to the discharge of a claim granted under a material error, as to the legal rights of the granter, and consequently without consideration.⁵ The case of Dickson, which was a very nice and difficult one, will be

¹ Stair, i. 10. 13.

² Erskine, iii. 1. 16.

³ Wilson and M'Lellan, as reversed 7th Dec. 1830, 4 Wil. & Sh. App. 398.

⁴ Dixon, 27th May 1830, 8 Sh. 826 ; affirmed 7th Sept. 1831, 5 Wil. & Sh. 445.

⁵ Dickson, 17th Feb. 1854, 16 D. 586.

further examined when we are on the subject of the discharge of ordinary personal obligations.

The subject of the error in fact may be the person on whose engagement or obligation the parties rely ; and if the person contracting be an essential of the transaction, and the right acquired from the party pleading the error has not been transferred to a *bond fide* third party, the contract will be reduced. Thus, where the seller had been led to believe he was transacting with a company, whereas the purchaser, though one of the partners of the company, was acting for himself individually, and had become insolvent, the sale was set aside.¹ And, even after goods sold in error had been re-sold, the original seller was found to have a preferable claim on the price.² The re-sale was a transaction with third parties acting *in bond fide*, and was therefore good and valid ; but the original seller was found preferably entitled to the price due under the re-sale, as a *surrogatum* for the article which he had parted with, under an essential error.

Again, the error may be in relation to the subject of the contract or obligation ; as when one commodity is mistaken for another ; for example, when one, contracting to sell a piece of gold plate, delivers one of brass ;³ or as to the extent, or the particulars, of what is for sale.⁴

But, even as to matters of fact, it is necessary that the mistake shall be unavoidable, or at least that the party in error shall not have himself to blame for his ignorance. If, when he entered into the obligation, he had the means of knowledge of the fact within his power, and did not use these means, it would seem that he cannot, by proceedings at law, rescind his contract, or be freed of his obligation. Thus, in a slump sale, without inventory, articles of value may be included, although no adequate price is paid.⁵ Lord Murray in Dawson's case says, ' Nothing is ' more common than a slump sale of moveables, which, after descending ' from father to son with the estate, it may be for centuries, are separated ' as executry, and go to the nearest of kin, while the estate goes to the ' heir. There may have been family portraits of little or no apparent ' value ; violins that have not been strung or played upon for forty years ; ' old books, much rubbish, and innumerable other articles, in one or more ' country houses. Such executry is usually valued by persons employed ' by the parties, and sold in the slump. Would it be a ground for ' setting aside such sales, that some old books, violins, or portraits, had ' not been looked at ? Yet what was thought to be a portrait worth a ' few shillings, turned out to be a valuable Vandyke, which had been ' painted over, or accommodated with a periwig like those mentioned ' in the *Spectator*, and could be sold for £800 or £900 ; or that among ' the unstrung violins there was one which could be recognised as a

¹ Dunlop, 18th Jan. 1752, M. 4879 ; reference may also be made to the case of Love, 24th June 1786, M. 4948.

² Chrystie, 17th Dec. 1748, M. 4897.

³ Erskine, iii. 1. 16.

⁴ Hepburn, 4th July 1781, M. 14,168.

⁵ Dawson, 6th March 1851, 13 D. 843.

'Straduarus, and was 'worth from £250 to £400; or a paltry-looking edition of Boccaccio, which might turn out to be worth £1000, though the valuers might truly swear that they had never observed it, or did not consider it worth 12s.'

Another case, which occurred in England, but is of the class now under consideration, is that of *Hawkins*.¹ There the Court decided that a sum of £12,000, of which both buyer and seller were ignorant, was included in a sale of all the seller's interest under a certain will, although the total consideration given by the purchaser for the £12,000, and other estate, was only £2000. Moreover, the seller's ignorance was apparently attributable to the fraud of another party, but not the purchaser. The case of *Hawkins*, however, is to be contrasted with that of *Purdon*,² in which the receiver of the deed granted in error, or his agent, knew that it embraced, in its words, claims of which the grantor knew nothing. A discharge in these circumstances was reduced.

We have an instructive case of an obligation undertaken in error, but held good.³ A creditor holding a preferable security over certain lands, with power of sale, had exposed the lands to sale. The trustee, under a private trust-deed granted by the debtor, for behoof of his creditors generally, and who also had power of sale, with power to transact all disputes and questions, served a protest against the intended sale by the creditor, in which he set forth that the estate was greatly more than sufficient to pay all the truster's debts; and that, if the sale was allowed to proceed, the debtor, in place of having a comfortable reversion, would be utterly ruined. A negotiation ensued, and the creditor was induced to abandon the intended sale; the trustee engaging, in respect of the abandonment, to pay him the amount of his debt out of the price of the first trust-lands that should be sold. Afterwards it was found that the creditor's security was null, owing to a technical objection, and the trustee then endeavoured to reduce his obligation, on the ground of error *in substantialibus*; but the Court, though with much difficulty, held the obligation good. There had plainly been an error, but the trustee had shown, when protesting against the sale by the creditor, that he expected full payment of the whole debts due by the estate; in which case the validity or non-validity of the security was immaterial; and, moreover, matters were not entire. This judgment was affirmed,⁴ contrary, however, to the opinion of Lord Wynford, who would have annulled the contract, because a material 'error' entered into it.

The last case I will notice on this head is that of *Wilson and McLellan*, before referred to. A messenger-at-arms had failed to obey an order to execute ultimate diligence for payment of a debt. His cautioner being thereupon prosecuted for payment of the debt, decret was ob-

¹ *Hawkins*, 30th Jan. 1850, Law Journal Reports, vol. xix. p. 451.

² *Purdon*, 19th Dec. 1856, 19 D. 206.

³ *Grieve*, 25th Jan. 1828, 6 Sh. 454.

⁴ 19th Aug. 1833, 6 Wil. & Sh. 543.

tained against him. Several months afterwards, the cautioner paid the debt; and, more than a year subsequently, he took an assignation of the debt from the creditor, with the ordinary obligation of warrandice from fact and deed. Afterwards, when he attempted to recover the debt from the proper debtor, it was found (as would have been found at first, had the papers been properly examined) that the writ constituting the debt (a promissory-note) was vitiated *in substantialibus*; at least, that the instrument of protest taken on it was open to a fatal objection. The cautioner thereupon prosecuted the granters of the assignation in his favour for repetition, and got judgment against them in the Court of Session; but the House of Lords reversed the judgment, on the ground that the cautioner's ignorance of the facts was not unavoidable. Lord Lyndhurst's remarks when deciding the case are impressive and instructive.

These cases will, I think, show the nature and requisites of the plea of error, as a ground of impeaching the validity of a contract or obligation.

CHAPTER II.

FRAUD is defined a machination, or contrivance to deceive; and, FRAUD. where there would have been no contract, if the one party had not been fraudulently led into it by the other, the party so led is justly said not to have contracted, but to have been deceived.¹

The above definition applies to cases of fraud which the Common Law reaches; but we have also to consider those frauds which are struck at by Statute; and which generally consist in attempts by parties to give to relatives or friends what the state of the parties' affairs does not warrant; or to confer an unlawful benefit upon one creditor or claimant, in preference to others. As to what will be dealt with as fraud at Common Law, it is impossible to give any specification. There are unfortunately few large branches of this course, in which examples of deception, or the intention to overreach, are not exhibited.

By the Roman Law, where the lesion was very great, fraud was presumed; as when the price was more than double the value of the subjects; or *vice versd.* Small differences between price and value were not considered. We have not expressly adopted the above as a general rule in Scotland. With us, fraud in general is not presumed, but must be proved; and where contracting parties are substantially on equal terms, and have equal opportunities in regard to preliminary in-

¹ Erskine, iii. l. 16.

quiries and negotiations, the mere inadequacy of consideration, on one side or the other, will not *per se* support the plea of fraud. But inadequacy of consideration is a material element in any case of reduction, on the plea of fraud at Common Law. Mr. Brodie, in his Notes on Stair,¹ says, 'If the transaction have been fair, and understood, there is no ground for complaint, however inadequate the price, provided the other party were of sound mind; but the real question is whether or not fraud and circumvention are to be inferred from the inadequacy of the consideration; and this was well stated by Lord Thurlow in the following words: "If there be such inadequacy as to show that the person did not understand the bargain he made, or was so oppressed that he was glad to make it knowing its inadequacy, it will show a command over him which may amount to a fraud." As to the inequality requisite to set aside a conveyance, the same learned Lord observed in another case, that "it must be so strong, gross, and manifest, that it must be impossible to state it to a man of common sense without producing an exclamation at the inadequacy of it." Does not this approach to the principle of the civil law; for would not any man of common sense exclaim at a purchase at more than double the just price?'

A case of reduction, on grounds similar to those stated by Lord Thurlow, is to be found in Gordon.² A party heavily burdened with debt, and who had been for many years in prison for debt, was induced by a creditor, holding an adjudication, or judicial security for debt, on his estate, to make over the estate in consideration of some temporary relief, but really almost without any value. The bargain, moreover, was not plainly told in the deeds executed on the occasion; these, professing to relate to an onerous sale, consisted of a disposition, a bond, a back bond, and a letter,—no fewer than four documents applicable to what is usually settled by one. The House of Lords dealt with the case as one of fraud, and reduced, apparently on the ground of fraud and circumvention, inferred from the distressed state of the granter of the disposition, the deceitful terms of the writings, and the great inequality of the bargain.

Two other cases may be here quoted under this general head: An obligation was granted by a man of eighty years of age, and who had become facile, agreeing to discharge bonds to the amount of £3000 and upwards, on obtaining his debtor's bill at three months for £230, and an annuity for his life at the rate of $7\frac{1}{2}$ per cent. on the balance of the £3000. A large part of the debt proposed to be discharged was heritably secured; but there was no proposal to give any security for the annuity, the amount of which, with reference to the party's age, was totally inadequate to the value of the debt. The debtor had the assistance of his agent in the transaction; the old man, though he had an agent in

¹ Brodie's Stair, p. 90.

² Gordon, 28th April 1730, 1 Craigie & Stewart's App. 47.

Edinburgh, where the transaction was agreed on, had not the assistance of his agent, and was shown to have had no clear understanding of what was done ;—the obligation was reduced.¹

An agreement was entered into between a person, eighty-three years of age, on the one part, and his daughter and her husband on the other, by which the father gave up the right to not less than £4000, held by trustees (and which he was to forfeit if he married again, when, however, he was to have a life annuity of £40 and a free house), and, on the other hand, the daughter and her husband bound themselves to pay him £40 yearly during his lifetime. The daughter and her husband had an agent, who drew the agreement. It was not revised by any one on behalf of the father ; nor had he any adviser in the transaction. The father granted a deed creating adverse rights, and revoked the agreement, which the Courts reduced on the ground of false representation, fraud and circumvention, and facility.² But the inadequacy of the consideration was a large element in the decision. Lord Lyndhurst, moreover, remarked on the form of the deed, which, though truly the cession of an estate yielding nearly £200 a year, subject to retention of an income of £40 for life, was made in the form of an onerous contract, and as if for a valuable consideration. When a party is about to execute a deed by which he makes a gift, he should grant a deed of gift in words and name, as well as in substance.

The various forms in which fraud is met with, though very near of kin to each other, are arranged in books of authority under different heads ; as, Collusion, Concealment, Misrepresentation, Circumvention, etc. And it will be convenient to consider them in the same way ; and first of COLLUSION.

An old case under this head is quoted by Lord Stair.³ The creditor of a party residing abroad instituted proceedings for attaching his debtor's lands in security and payment of debt. The debtor being abroad at the time, sixty days' notice was necessarily given of the creditor's proceeding. Another creditor, in collusion with the debtor, brought the debtor to this country, whereby similar proceedings became competent on fifteen days' notice. The second creditor, in consequence, obtained the first decret ; but the diligence of the first creditor, though posterior in date, was preferred, because of the collusive device through which the proceedings of the second creditor had been hurried forward. A decision, on exactly the same principle, was pronounced in the case of M'Ewen.⁴ Again, when a party, who received a bond from his brother, granted him a discharge of the same date, and subsequently granted an onerous assignation of the bond, the discharge was held null

¹ M'Neill, 4th July 1816 ; affirmed 21st May 1824, 2 Sh. App. 206.

² M'Diarmid, 17th May 1826, 4 Sh.

VOL. I.

583 ; affirmed 28th March 1828, 3 Wil. & Sh. 37.

³ Brodie's Stair, p. 90.

⁴ M'Ewen, 30th May 1828, 6 Sh. 889.

as against the assignee, the Court regarding it as a piece of deception, to which the debtor in the bond was a party.¹ And a gratuitous discharge by a son to his father, of a sum provided to him by his contract of marriage, upon agreement made with the father of the date of the contract, was found fraudulent and null as to the son's creditors, who traded with him after the discharge.²

CONCEALMENT
AND MISREPRE-
SENTATION.

Lord Mansfield lays down the regulating principles of all contracts in reference to this particular, as follows: 'The governing principle is 'applicable to all contracts and dealings. Good faith prohibits either 'party, by concealing what he privately knows, to draw the other into 'a bargain from his ignorance of that fact, and his believing to the 'contrary.'

One of the leading cases on this point is that of Smith,³ in which the agent for the Bank of Scotland at Thurso had found security for his intromissions to the extent of £5000. He had been nine years the bank's agent, had been engaged in business on his own account, was liable for large advances made to him in cash and by bills; and notes and bills in his hands, as agent for the bank, were increasing in amount, though the business actually done at his branch was not in the way of being extended. In these circumstances, the bank directors, who had become dissatisfied with their agent's conduct, and distrustful of his solvency, insisted that he should give new security to the extent of £10,000—that is, £5000 additional,—their minute expressing, as the only reason for this demand, that 'several of his cautioners were dead.' The bank secretary, in communicating this minute to the agent, said, 'The directors, finding 'some of your cautioners are dead, and at the same time considering that 'the present amount of your caution is too small for the business done 'at Thurso, desire that the amount of your caution be £10,000.' Neither the minute, however, nor this letter, stated the full reasons of the demand for new security, as was found after the case came into Court. The directors gave no hint of their dissatisfaction and distrust, nor did they induce the new cautioners to make inquiry on the subject. In these circumstances, the additional security was procured, and the bond signed. This was about six months after the demand made upon the agent; and, the bank inspector having just at the same time visited the branch, the state of affairs was found so bad, that the agent was immediately removed. The bond covered past as well as future liabilities; and the new cautioners resisted payment, on the ground of fraudulent concealment of the state of the agent's position at the time they entered into it; which plea was found good, and they were relieved of liability. The whole case is most instructive; and I wish to call attention to the following observations of Lord Eldon upon it:—'If it should appear that a person became 'surety for another who was at the time in arrears to his employer, that

¹ Thomson, 4th Dec. 1665, M. 4906.

² Caddell, 21st Jan. 1680, M. 4906.

³ Smith, 9th June 1813, 1 Dow, 272; and 14th Jan. 1829, 7 Sh. 244.

'employer being ignorant of the fact, then I am clearly of opinion that
'the surety must be understood to have taken, for better or for worse,
'the conduct, character, and credit of him for whom he became surety.
'But if, on the other hand, a man, or a body of men, employing a number
'of agents, find one whom they have reason to suppose not trustworthy,
'one who most likely owes them large sums of money, or who, they may
'have reason to suppose, owes them large sums of money, and call on
'that man to give sureties, or cautioners as it is called in Scotland, both
'for his past and future dealings, thereby holding him out as a person
'trustworthy, when they know, or have strong ground for suspecting
'that he is not so, that would not bind the cautioners or sureties.'

The concealment is not necessarily wilful and intentional; it is enough if material facts, which ought to be communicated to a party about to become cautioner for the acts and intromissions of an agent, are not communicated. The omission to communicate may be fatal, though proceeding from want of judgment, want of recollection, or other innocent cause. If there are facts within the knowledge of the parties, which, in point of law, they were bound to communicate, but did not, it is sufficient to annul the obligation.¹

But there is an important distinction between cases where the obligation sought to be reduced is in favour of the party who has appointed the agent, and who, by continuing him in employment, is giving a guarantee of his honesty and fidelity, and where it is granted to one not so situated. In the case of Webster,² the cautioner for a bank agent, who was his nephew, became alarmed at the great extent of discounts, and insisted on his nephew limiting the amount to a certain sum yearly, otherwise he would withdraw his security. The nephew thereupon, without communication to his uncle, prevailed on a third party to become bound to relieve his uncle to a certain extent; but the uncle did not interfere in the negotiation with that party, and knew nothing of what was intended, till the bond of relief was handed to him. The nephew failed, and the granter of the bond of relief suspended a charge on that bond, on the ground of collusion; but the Court decided against him.

The distinction is still greater, where the obligation under reduction is not to a constituent on account of his agent, but to a banker or merchant, for behoof of a debtor or customer, or one to whom a credit is about to be allowed on a cash account. There must be fair dealing in all cases; but, in this case, the bank or merchant gives no warranty of the character or solvency of the principal debtor; it is rather the cautioner who does so; and the cautioner must look for all information to the principal,—at least not to the grantee of the bond,—who (assuming that there is no fraud) is not entitled to give to an intending cautioner particulars of the circumstances and liabilities of the principal debtor.³

¹ Railton, 31st Jan. 1844, 6 D. 536;
reversed 14th June 1844, 3 Bell's App. 56.

² Webster, affirmed 28th May 1813, 5
Paton, 705.

³ Hamilton, 8th Dec. 1842, 5 D. 280;
affirmed 11th March 1845, 4 Bell's App.

On the subject of the distinction between this case and that of a bank agent's cautioner, Lord Moncreiff says, 'This is totally and fundamentally different from the case of an officer or servant of the bank itself. If such an officer has misconducted himself, in a way which they know cannot be ascertained by other parties, they cannot, in dealing with others, in regard to this informality, deceive them by the show of confidence in still retaining him in their employment and credit. But, in the other case, they are merely dealing with a customer in apparently solvent circumstances; and it lies with those who think him worthy of such trust and credit, as to join in soliciting for him the aid of a bank for a time, to satisfy themselves as to the use which he may make of the credit, and of his general correctness in trade or business.' But, as has been said, the governing principle is, that there must be fair dealing in all cases. A bond to a bank for £2000, by a principal and co-obligant, narrated that the manager of the bank had advanced that sum to the principal, 'as the full consideration for his and the parties after mentioned granting these presents.' One of the co-obligants alleged that he had been fraudulently induced to sign the bond on the faith of the narrative, whereas the fact was, that the principal obligant, instead of receiving a present advance of £2000, was then indebted to the bank on account of previous advances in a sum of £7000, and the bank were getting the bond under an arrangement with the principal obligant for security, *pro tanto*, of that sum. In these circumstances, the Court granted issues to try the question thus raised;¹ and, the case having gone to trial, it was held, upon a proof, that the co-obligant was induced to sign in the belief that the true consideration of the obligation contained in the bond was an advance of a sum of money by the bank, as set forth in the narrative, and in ignorance of the true nature of the transaction; that he was thus induced to sign the bond by misrepresentation; and that the bank was responsible for such misrepresentation.²

The distinction between Falconer's and Hamilton's cases is fully explained by the Lord Justice-Clerk Inglis and Lord Cowan.³ The Lord Justice-Clerk says of Falconer's, 'I am satisfied that this is a case not of undue concealment merely, but of positive misrepresentation.' You will also find that the nature of the narrative to be introduced in the deed had been the subject of discussion between the parties, and that the agent of the bank at Aberdeen had desired to insert a true narrative, such as, if adopted, would have excluded the co-obligant's objections. This true narrative, however, was thrown out, apparently because, if insisted in, the co-obligants would not have signed.

CIRCUMVENTION.

Two cases of Circumvention may be noticed,—

1. The case of Leiper,⁴ where minor children, one of whom was pre-

¹ Falconer, 19th Dec. 1862, 1 Macph. 177.

² 20th March 1863, 1 Macph. 704.

³ Pp. 713 and 715 of the above vol. of the Reports.

⁴ Leiper, 9th July 1822, 1 Sh. 552.

sumptively the heir of provision to his grandfather in certain lands, under a marriage-contract, entered with consent of their curator into a submission with their grandfather, by which they renounced all right to the lands, in consideration of a price to be fixed by the arbiters. The arbiters awarded an inadequate sum. Thereafter, when the heir attained majority, his grandfather took from him a ratification of the decree-arbitral, and a discharge of his rights. The grandfather then conveyed the lands to his own son of a second marriage. At the distance of about thirty years, the Court, at the instance of the heir under the marriage-contract, reduced these deeds, on the ground of fraud and circumvention; holding 'that the submission and decreet-arbitral, taken in connexion with the terms of the previous submissions entered into betwixt the same parties, contain *in gremio* proofs of fraud and imposition; and that the subsequent deed, by which the submission and decreet-arbitral are said to have been ratified, cannot be effectual.'

2. The case of Ewen,¹ where a daughter had rights and expectations under her father and mother's marriage-contract, which ultimately were of large value; and the father, after her mother's death, and at a time when his daughter and her husband had just attained majority, and were in pecuniary distress, and the husband was about to sail to India, obtained a general discharge from them of all their rights, which discharge was prepared by his agent, without being revised by an agent on their part. The discharge was general, of all claims competent through the decease of the mother, under her marriage-contract, or otherwise; but it did not contain a full or even a true statement of the consideration for which it was granted. It did not set forth the daughter's rights under the marriage-contract; it narrated that it was granted in consideration of £315, agreed to be given by the father, in name of tocher, out of his own free will, and from regard to his daughter and her husband; and further, that one half of that sum had been actually paid down, whereas the father retained a large part in extinction of an alleged debt, and only gave his promissory-note at twelve months for the balance; the other half was to be payable twelve months after his death, but no security was given for payment. Lord Wynford held that the father took advantage of his influence over his daughter, and of the situation of her husband at the time the deed was executed, and fraudulently obtained from them a renunciation of the right secured to her by the marriage settlement; and the House of Lords held the discharge not binding.

With regard to the effect of fraud, when established, a distinction is FRAUD. to be observed between questions with the wrongdoer only, and those in which third parties are concerned. In questions with the wrongdoer, fraud is a good ground of defence against performance of an obligation unfulfilled, or of reduction of a deed granted.² But with third parties, the maxim of the Civil Law, adopted as a general rule in our

IN QUESTIONS
WITH WRONG-
DOER.
WITH THIRD
PARTIES.

¹ Ewen, 5th Feb. 1828, 6 Sh. 479; reversed 17th Nov. 1830, 4 Wil. & Sh. 346.

² Erskine, iii. 1. 16.

law, is, '*Dolus auctoris non nocet successori ex titulo oneroso*,' and this rule is expressly embodied in the Scots Act, 1621, cap. 18, to which we are presently to advert.

This point has recently been decided in conformity with the above rule, in reference to a bond and disposition in security, granted by a party, against whose title, as purchaser of the subject of the security, an action of reduction was subsequently brought, on the ground of alleged fraud in making the purchase. The lender had dealt with the purchaser *in bonâ fide*. No privity or concert of any fraudulent nature was alleged between him and the purchaser; and the Court were unanimous in supporting the security.¹ Lord Ivory held that the bond would be good, even if the reduction of the granter's title should be successful.

The same rule holds in regard to the transfer of corporeal moveables, which pass to a *bonâ fide* purchaser by delivery. Likewise in the case of the indorsation of bills, from favour to commerce, provided the indorsation takes place before the bill falls due. When a bill is indorsed after maturity, the indorsee is liable to all the objections or exceptions to which the bill was open, while in the hands of the indorser.²

ASSIGNATIONS TO DEBTS.

As regards assignments to debts on bond, or other personal obligations or contracts, the rule is different. In such cases '*assignatus utitur jure auctoris*.' The assignee is so far in the same case with the cedent, that all exceptions competent to the debtor against the cedent are good against him as assignee.³ This exception is founded on principles of strict reason and justice; and, when the ordinary rules of dealing in the case of the transfer of debts are followed, no loss can arise from its application. The transfer of a debt is not a transaction simply between the creditor or cedent and the assignee. The creditor ought to apply, and usually does apply, to the debtor for payment. The debtor again, when thus called on, if he cannot conveniently pay the money, gets a third party to agree to lend the amount; and, in place of taking a discharge of the old and granting a new obligation, he gets the existing creditor to assign the old obligation to the new creditor. The new creditor thus acquires right to the debt, at the request, not of the old creditor, but of the debtor. This is the regular course; it gives opportunity to the debtor to state any objections he may have to the debt, and if he makes none, and, on the contrary, requests the new creditor to lend, on transfer from the old creditor, he is barred from raising objection, and the new creditor is secure against latent exceptions to the cedent's title. If, therefore, any one takes an assignment to a debt, in the way of a transaction with the cedent only, he is going out of the usual beaten track, and he must take the risks. It is the business of the assignee to learn from the debtor whether the claim of the existing creditor or cedent is clear and unexceptionable.

¹ Williamson, 3d Dec. 1851, 14 D. 127.

² Merc. Law Amendment Act, 19 & 20 Vict. c. 60, s. 16.

³ Stair, iv. 40. 21; M'Donnells, 10th Nov. 1772, M. 4974; and Delvalle, 9th March 1786, M. 4978.

A different rule was allowed to operate in the case of the York Buildings Company.¹ But this was because of a specialty. The bonds of that Company, which, by their terms, were transferable by indorsement, were issued at less than their nominal amount; but, having been transferred from hand to hand in virtue of blank indorsations, the Court held that any one who had acquired 'for value' must be presumed to have acquired fairly, and was a creditor for the full amount; and that the Company were not entitled to plead against him latent objections competent against other persons whose names did not appear on the face of the bond or indorsement. This was placing these bonds, in respect to this question, on the footing on which bills then stood. Again, where a share of the stock of a joint-stock company is held in the name of an individual, *ex facie* absolutely and for his own behoof, though subject to a latent trust for behoof of a third party, the latent right will not be effectual against *bond fide* purchasers or onerous special assignees of such share of stock. The right of the purchaser or onerous special assignee to the share of the stock, duly intimated to the company, was preferred to the latent right in the case of Redfearn.² But where the nominal holder has become bankrupt, and has been sequestered, and the competitor with the latent right is merely the trustee in the sequestration, holding a general conveyance from the bankrupt, not a *bond fide* purchaser or onerous special assignee, even a latent right to stock or other such personal estate will prevail against the claim of the trustee for the general creditors. The trustee for the general creditors is not (as to such a matter) in a better position than the bankrupt himself; and the bankrupt was merely a trustee, not the true proprietor.³ The doctrine, therefore, laid down by Erskine,⁴ to the effect that even latent exceptions against the cedent will affect the assignee in personal rights, appears to be incorrect to this extent, that, when these exceptions are not in relation to proper debts, and on the part of the debtor himself, they will not prevail against *bond fide* purchasers or onerous special assignees.

CHAPTER III.

I WILL now call your attention to the Statutes which strike at deeds granted by debtors in defraud of their creditors.

The first of these is the Act 1621, cap. 18, following on and embodying an Act of Sederunt of 12th July 1620, which it describes as a necessary and profitable law for the weal of all His Majesty's subjects. The

DEEDS BY
DEBTORS IN
DEFAUD OF
THEIR CREDI-
TORS.
1621, c. 18

¹ York Buildings Company, 15th Nov. 1791, M. 10,466.

³ Gordon, 5th Feb. 1824, 2 Sh. 675.

² Redfearn, reversed 1st June 1813; 5 Paton, 707.

⁴ Erskine, iii. 5. 10.

Act of 1621 authorizes reduction of all alienations of lands or goods granted by debtors in defraud of their true creditors, to conjunct or confident persons, without true, just, or necessary causes, and without a just price really paid,—without prejudice to the rights of purchasers from the interposed persons. It likewise strikes at voluntary payments or rights by the debtor or interposed person to any one in defraud of the diligence of another creditor. A full analysis and exposition of the Act will be found in Bell's Commentaries.¹ I will here notice only some leading points, and those which bear most directly upon Conveyancing.

(1.) Conjunct persons, in the sense of the Act, are those nearly connected by blood or affinity: parents and children, brothers, sons-in-law, uncles, stepsons, uncles by affinity, sisters and brothers-in-law; but not persons married to several sisters of the same family, whose connexion with each other, through such marriages, is only *affinitas affinitatis*.²

(2.) Confident persons include partners in trade, confidential men of business, factors, and servants.

(3.) The Act is held applicable to all dispositions granted in defraud of creditors in favour of any person, whether conjunct or confident or not, when without a competent onerous cause. It likewise strikes at bonds, discharges, and other deeds in defraud of creditors, as well as deeds of the class expressly named in the Act. Moreover, if a right be purchased with the debtor's money, it will fall under the Act, though the conveyance thereof be granted directly to the conjunct or confident person, as much as if it had been actually granted to such person by the debtor himself. The granting of the conveyance to the conjunct or confident person is truly the act of the debtor, though it is not done in his name. Cautionary obligations, however, are not struck at by this Act. It is true that they are to the prejudice of the grantor's other just and lawful creditors, and that the grantor receives no value for them, but they are onerous in respect of the grantee.

Provisions to wives, by antenuptial contract, are onerous in respect of the marriage which follows thereupon, and therefore are not reducible under the Act, so far as not exorbitant;³ or unless the husband was known to be insolvent at the time of granting them.⁴ Neither do rational provisions to wives, granted after marriage, fall under the Act where the wife was previously unprovided.⁵

Antenuptial provisions to children are onerous, so far as not exorbitant; and the father's notorious insolvency at the time of granting them will affect them as well as the wife's provisions. Moreover, antenuptial provisions to children, payable at a term which cannot arrive until after the father's death, will constitute the children only heirs of their father, as in competition with his creditors, and give the children no right to compete with such creditors, as claimants on their father's estate.

¹ Bell's Commentaries, ii. 183.

² M'Gowan, 24th Feb. 1826, 4 Sh. 498.

³ Duncan, 8th Feb. 1785, M. 987.

⁴ Wood, 2d Nov. 1680, M. 977; and

other cases cited in Erskine, iv. 1. 33, and notes.

⁵ Robertson, 11th June 1738, M. 957; and other cases cited by Erskine, *ut supra*.

Postnuptial provisions to children, whether existing or *nascituri*, are all gratuitous in the judgment of the law; and will be annulled in competition with creditors, if the father was not solvent at the date of granting them.¹ But a provision made by a husband by postnuptial contract of marriage, in favour of his wife and children, at a time when he was found on investigation to have been perfectly solvent, was sustained; there being no fraud, and the value not having been much beyond the amount of the fortune which the granter of the provision received with his wife.² Gratuitous deeds, even in favour of conjunct and confident persons, are not reducible, if, at the date of delivery, the granter was possessed of funds to meet them, and to satisfy all his debts.³

With reference to this Act, the date as at which the solvency of the granter is to be ascertained, in trying the validity of such deeds, is not that of executing, but of delivering the deed under challenge.⁴ The fact of the debtor's insolvency at the date of the alienation must be expressly averred in the reduction under this Act.⁵

The next Statute, of the class under consideration, is that of 1696, 1696, c. 5. cap. 5, of which a full exposition will be found in Bell's Commentaries.⁶ By that Act, all voluntary deeds granted by the bankrupt, directly or indirectly, either at or after his bankruptcy, or within sixty days before it, in favour of a creditor, either for the creditor's payment, or further security, in preference to other creditors, are declared null.

Various circumstances which, by themselves, or in combination, constitute bankruptcy, will be found expressed in the Bankrupt Act of 1856.⁷

Under the Act of 1621, where diligence has been begun by any creditor to affect the insolvent debtor's lands, or goods, or the price thereof, held for the debtor's behoof, the insolvent debtor cannot make any voluntary payment or right to any person in defraud of such diligence; and he cannot by any act facilitate or expedite the doing of diligence by another creditor, even though the result is simply to create an equality, and prevent one creditor from acquiring a preference over another.⁸ He cannot even grant a bond of corroboration, though only to the effect of constituting an existing debt, and thereby enabling the creditor to obtain a judicial security over his estate, by leading an adjudication, without a previous action in Court for constituting and ascertaining the debt.⁹ The reason is, that, were the debtor allowed voluntarily to interfere in any way, he might, by aiding one creditor, and refusing aid to another, actually create preferences. So he is held absolutely disqualified from interference. Where no diligence was begun by a creditor, the Act 1621 did not prevent the debtor from granting

¹ Erskine, iv. l. 33, Note 23.

² Jeffrey, 24th May 1825, 4 Sh. 32.

³ Bell's Commentaries, ii. 193.

⁴ Inglis, 14th Nov. 1676, M. 11,567.

⁵ Bolden, 6th March 1863, 1 Macph. 522.

⁶ Bell's Commentaries, ii. 205.

⁷ 19 & 20 Vict. c. 79, ss. 7, 8.

⁸ Scott, 19 Jan. 1788, Bell's Octavo Cases, 32; Strang, 12th May 1821, 1 Sh. 1.

⁹ Dunbar's Creditors, 18th June 1793, M. 1027; Macmath, 1st March 1791, Bell's Octavo Cases, 22.

securities over his estate, and thereby preferring one creditor to another ; but the Act of 1696 strikes at all partial preferences of one creditor over another, whether diligence had been begun or not. It likewise strikes at the indorsation of bills, in payment or security of prior debts, unless made in the ordinary course of trade ; in which case the indorsation is held equivalent to the payment of a debt in cash, which, if the debt is actually due, and the cash is actually paid, is not struck at by either Act, supposing always there is no collusion.¹ If there is collusion, either as to bills or cash, the Common Law will set aside the transaction. But there is a distinction to be observed between bills and promissory-notes as to this matter. Promissory-notes, when given in payment of debts already due, and not merely to settle a purchase at the usual credit, are on a different footing from bills. Bell says,² promissory-notes in the former circumstances, that is, for payment of debts already due, are for the time a confession of insolvency, a mere gaining of time to pay, and so are struck at. It is not necessary, however, that the rights be made in favour of the creditors directly ; the Act reaches preferences, though made indirectly, through an interposed person.³

Whether securities, given to cautioners in relief of their engagements, fall under the Act of 1696, does not seem clearly settled. If the cautioner is not a prior creditor, and if there is no collusion, it would rather seem that he may validly obtain a security within the sixty days. But if the cautioner, directly or indirectly, derives benefit, as a prior creditor,⁴ from the security, or if there is any collusion, the security will not stand.⁵

Dispositions in consideration of a fair price, instantly paid, do not fall under either Act.⁶ Nor does either Act reach securities, granted for value instantly advanced and lent, or '*nova debita*,' as these are technically called.⁷ The question of fact always, of course, arises in each case, whether or not the disposition or the security granted is of such a nature as to be protected as being *novum debitum*. In reference to securities challenged and sustained, I may refer to the case of Cormack, formerly cited.⁸

In regard to sales, where possession was given of a brickwork on the fifty-eighth day before bankruptcy, in implement of a sale made on the sixty-first day before bankruptcy, and when (that is, upon the sale) the price had been paid, it was held that, as the sale was made *bonâ fide*, and there was no fraud, the transference of the property was not voluntary, and was not in satisfaction of a prior debt. The sale, therefore, was

¹ Stein's Creditors, 1st March 1791, M. 1142.

² Bell's Commentaries, ii. 219.

³ Barbour, 30th May 1823, 2 Sh. 351 ; Miller, 11th Dec. 1822, 2 Sh. 77 ; affirmed 12th June 1827, 2 Wil. & Sh. 579.

⁴ Monteath's Trustees, 12th Dec. 1794,

M. 1146 ; Swinton's Trustee, 19th Feb. 1790, M. 1181.

⁵ Swinton's Trustee, before referred to.

⁶ Bell's Commentaries, ii. 215, 220.

⁷ Johnston, 29th Jan. 1751, M. 1130 ; Mitchell, 12th Nov. 1799, M. App. Bankrupt, No. 10.

⁸ Cormack, 8th July 1829, 7 Sh. 868.

sustained.¹ Again, where a sale of guano was made within sixty days of bankruptcy, but *bonâ fide*, and at a fair price, payable by bill, the guano to be delivered as required, and delivery took place within six days of bankruptcy, but without fraud or collusion, it was held that the delivery was in implement of a legal obligation, and that the transaction was not struck at by the Act 1696.² We have a still more difficult case, in which a sale was sustained.³ In that case a father agreed, by missive letter, to sell his lands to his son, who was his creditor to a large amount. The father was at the time insolvent; and within sixty days of bankruptcy he granted a disposition to his son in implement of the missives of sale, which were dated about six months previously; and the son was infert. No money actually passed on the occasion, it having been arranged that the father was to be credited with the price in account with his son. In these circumstances, the transaction was objected to, as giving the son a preference to the extent of the price of his purchase, within sixty days of the bankruptcy; but no *mala fides*, on his part at least, was alleged; and the Court (altering the judgment of Lord Fullerton, Ordinary) sustained the sale.

The obligation, however, in order to be dealt with as a *novum debitum*, must be for a present and immediate disposition of, or security over, a specific subject; and the money must be advanced in contemplation, and on the faith, of that conveyance or security. If the transaction is, generally, for a security to be afterwards given; or if it is begun on the simple and ordinary footing of debtor and creditor, and then within the sixty days a security is interposed, the security will fall under the provisions of the Act. And, even although the obligation to give security is specific, and in consideration of an immediate advance, yet if it is not an obligation to give the security instantly, the security, if only given within the sixty days, will fall under the provisions of the Act. Thus, in the case of Moncrieff,⁴ a loan was advanced on a promissory-note, with relative letter, engaging to grant an assignation in security, 'at any time required.' The assignation was not required till within a few days of bankruptcy, and the Court were of opinion that the instant granting of the security was not the consideration of the advance; that there was no obligation to grant it till requisition; and that, in fact, there was only an obligation at some future indefinite period to grant a further security,—and so they reduced the security. And under former, as well as the present Bankrupt Acts, even an obligation to grant an immediate security, on the faith of which an instant advance takes place, requires to be actually implemented before sequestration.⁵ The present Bankrupt Act, by sect. 111, declares not only all payments, preferences, or securities obtained by, or granted to, prior creditors, but likewise all acts

¹ Taylor, 8th March 1855, 17 D. 639.

² Lindsay, 19th March 1862, 24 D. 821.

³ Cranston, 2d Feb. 1830, 8 Sh. 425; affirmed, 6th July 1832, 6 Wil. & Sh. 79.

⁴ Moncrieff, 16th December 1851, 14 D. 200.

⁵ See 54 Geo. III. c. 137, s. 38; Mansfield, 11th July 1833, 11 Sh. 813; affirmed 10th April 1835, 1 Sh. & M.L. 203.

done or deeds granted by the bankrupt, after the date of sequestration and before his discharge, out of or in relation to his estate, unless with consent of the trustee, to be null and void; saving to third parties, in certain specified cases, the effect of acts done in ignorance of the sequestration. The reports of Mansfield's case give a full history of the decisions on the important point we have now been considering, and show that some of the Judges in Scotland suggest a doubt of the soundness of the decision in Cranstoun's case. Indeed, from Mansfield's and Moncrieff's cases, it seems to be thought that even an obligation to grant instant security, on the faith of which an advance is made, will not be available to support the security, afterwards granted, if any act of the debtor be required, or, *de facto*, be interposed, in the granting or completing of the security, and if bankruptcy follows within sixty days after such completion.

Questions were at one time raised on the Act of 1696 of much interest in Conveyancing; viz., whether the completion of a debtor's title after bankruptcy, in order to validate a security or conveyance previously granted, was struck at. If such completion does not require any act to be done by the bankrupt himself, it has been settled that the Statute does not strike at the completion; although, supposing it not to take place, the security or conveyance would be null, and the estate so far better for the general body of the creditors.¹ But to transact on an incomplete title, or to pay over a price or loan without getting a valid and complete deed of conveyance or security in exchange, is, in general, very blameable; and, besides that it may involve the agent in heavy pecuniary loss, it will be a great blot on professional character.

Mansfield's case suggests the importance of making sure that all the lands over which a security is to extend are included in the description and conveyance inserted in the bond and disposition in security, which, through unintentional error, was not there done. But this is not the stage at which to go into any detail on that point. Several of the decisions likewise suggest the necessity of a creditor retaining such security as he has, until any security granted to him is placed beyond the reach of challenge. There are various cases in which parties, who gave up old on getting new securities, were found, after being deprived of the new, not entitled to revert to or recover the old. They thus lost both the old and new.

The Act 1696 strikes also at all dispositions, or other rights for relief, or in security, of future debts, a species of security which had previously been made a fruitful source of fraud—declaring the same to be of no force as to debts contracted after the sasine or infeftment following on the disposition or right. But securities over moveable estate, for future debts, are not touched by the Act; and, as regards heritable estate, in the particular case of cash accounts or credits, securities have long been

¹ *M'Lagan's Creditors*, 21st May 1800, M. App. Bankrupt, No. 11; *Mitchell*, 12th November 1799, M. App. Bankrupt, No. 10.

allowed, by special Statute, for sums or balances to arise after the date of perfecting the security. The existing Act, containing this allowance, is that of 1856;¹ and, by an Act passed in 1857,² the bond and disposition in security may be granted in the abbreviated form authorized by the Heritable Securities Acts of 1847 and 1854, and may be completed by registration of the deed of security, without the necessity of passing infestment.

In order to prevent latent preferences, the Bankrupt Act provides by sect. 6 (as was done in the last Act), that the date of a deed, with reference to that Act, or the Act of 1696, shall be the date of recording the sasine, where sasine is requisite; and, in other cases, of registration of the deed, or of delivery, or of intimation, or of such proceeding as shall, in the particular case, be requisite for rendering such deed completely effectual. But, in reference to the Acts we have been considering, a husband's *jus mariti* stands in a peculiar position. Though the full patrimonial benefit of it will fall to the trustee in the husband's sequestration, it reaches only estate which has accrued to the wife, in the condition of moveable estate, during the marriage; and the husband's right may be extinguished during the marriage, as regards the fruits or profits of the wife's heritable estate, by such estate being sold, or otherwise ceasing to belong to the wife. Where, therefore, a heritable bond belonging to a wife was validly conveyed by her, with consent of her husband, to a creditor of her husband, the assignee was preferred, not only to the principal sum, but also to the interest, in preference to the trustee in the husband's sequestration, although the title of the assignee was not completed, by registration of the assignation, until two days after the sequestration was awarded.³ The fruits and profits—that is, the interest of the debt assigned—falling due after completion of the assignation, were held, by a majority of the Court, as following the principal sum, and as accruing to the assignee, and withdrawn from the *jus mariti*—Lord Deas dissenting, who said the case was one 'of great subtlety,' and who certainly argued for his own view with much force.

Cases of attempted preferences in sequestrations may naturally be considered here.

ATTEMPTED
PREFERENCES
IN SEQUESTRATIONS.

The object of the Bankrupt Laws is to facilitate the realization of the debtor's estate, and the equitable distribution thereof among his creditors, according to their legal rights. And, as the Law strikes at preferences given to creditors within a certain period before bankruptcy, so it prevents the giving or promising to any one creditor a larger proportional payment than to the others; both because such an act would be unjust to the general body of the creditors, and because one grand object in the Bankrupt Laws is to enable a trader or other person, who has been unfortunate, to obtain a clearance of all debts, and be in a situation to apply

¹ 19 & 20 Vict. c. 91, s. 7.

² 20 & 21 Vict. c. 19, s. 8.

³ Smith, 7th February 1857, 19 D. 384.

himself again to business, which he could not do were there a heavy load of debt upon him. But if creditors were allowed, each for himself, to bargain with the debtor as to the terms on which they would consent to his being discharged of bygone debts, it is clear that both of these objects would in general be frustrated. The Law, therefore, prohibits such transactions under the sanction of high penalties.

The existing Statute on this subject, and to which principally it is necessary to call your attention, is that of 1856.¹ By sect. 140, a bankrupt settling with his creditors by composition,—or (sect. 147) applying for a discharge without composition—is bound to make a declaration, or, if required, an oath, that he has not granted or promised any preference or security, or made or promised any payment, or entered into any secret or collusive agreement or transaction to obtain the concurrence of any creditor to acceptance of his offer of composition, or to his discharge. And, by sect. 150, all preferences, gratuities, securities, payments, or other consideration not sanctioned by the Act, and all secret or collusive agreements and transactions, for concurring in, facilitating or obtaining the bankrupt's discharge, are declared null and void; and penalties are imposed both on creditors obtaining preferences, and, by sect. 151, on the bankrupt, if participant in giving the same.

Undue preferences have, in various shapes, been often before the Court, and objections thereto are now competent by way of summary petition and complaint, even though not brought forward before the sequestration is wound up. The same principle was allowed effect in the case of a settlement by private composition-contract, and where there was no sequestration.² In this case, the favoured creditor had got payment, and he was compelled to repeat; the Lord Justice-Clerk Boyle saying, 'the transaction is illegal at Common Law, *contra bonos mores*, and opposed to the essential principles of justice, whether in regard to 'private compositions or those under the Bankrupt Act.' The creditor pleaded the maxim applicable to unlawful contracts, '*melior est conditio possidentis*,' on which Lord Alloway quoted Lord Mansfield as follows: 'If the act is in itself immoral, or a violation of the general rules of public policy, the party paying shall not have his action; for, where both parties are equally criminal against such general laws, the rule is, "*Potior est conditio possidentis*.'" But there are other laws calculated for the protection of the subject against oppression, extortion, deceit, etc. If such laws are violated, and the defendant takes 'advantage of the plaintiff's situation, then the plaintiff recovers.' The principle was again applied in a case where the cautioners for a composition in a private settlement, being also creditors, obtained from the debtor an assignation of his whole effects, with a view to their not only relieving themselves of their cautionry, but also operating full payment of their own debt. The assignation was found illegal.³

¹ 19 & 20 Vict. c. 79.

² Arrol, 24th Feb. 1826, 4 Sh. 499.

³ Robertson, 13th July 1837, 15 Sh. 1299.

The case, of course, is quite different, if a party not a creditor becomes cautioner in a composition. There is then no question of preference, and he may legally obtain an assignation to the full extent of the bankrupt's whole estate for relief of his cautionry. When the stipulation for a preference is not made secretly, it is not decided whether it is entitled to effect or not; and the Act of 1856 seems not to touch that point, at least it strikes expressly only at secret or collusive agreements, which last imply secrecy. This point is touched on in the case of *Levick*;¹ but it was there held unnecessary to decide it, as the stipulation in that case, openly made, was not expressed clearly to the effect of giving the creditor any preference. The Court held it as giving no preference, being of opinion that, in order to be so construed, the clause must be clearly and unambiguously to that effect, which in that case it was not.

Preferences in the form of bills by the bankrupt's wife and children to a creditor ranked in the sequestration are illegal;² and also in the form of obligations by the bankrupt himself.³ But it is not unlawful, when there is no collusion, for a bankrupt, after he has been discharged on composition, to become bound to pay to the creditor in a debt existing prior to the sequestration, and who did not rank on the estate, or concur in the composition-contract, the full amount of his debt.⁴

CHAPTER IV.

I PROCEED to consider the plea of Force and Fear as the ground of setting a deed aside. FORCE AND FEAR.

If a deed is extorted from any one by force and fear, it is not his deed. The mere subscription of it does not make it so, any more than if his hand had been led. The subscription is there, but not the consent; and the deed is reducible on proof of being so extorted. The fear required in order to infer reduction must be *verus et justus*; and what is sufficient for that purpose necessarily varies both in nature and degree according to circumstances, particularly in the respective cases of men and women. A long dissertation on this point will be found in *Morison's Dictionary*⁵ and in *Brodie's Stair*.⁶

In a case where it was found that the husband had used great violence to extort his wife's concurrence in a deed by him, the deed, as regarded her, was reduced;⁷ and the same result followed on proof of threats of vio-

¹ *Levick*, 27th Jan. 1829, 7 Sh. 327.

² *Riddle*, 20th November 1821, 1 Sh. 151.

³ *Kerr*, 14th Feb. 1828, 6 Sh. 546.

⁴ *Halyburton*, June 28, 1838, 16 S. 1235.

⁵ M. 10,280.

⁶ *Brodie's Stair*, p. 88.

⁷ *Cassie*, 27th July 1632, M. 10,279.

lence, and that the husband had frequently used violence towards his wife.¹ But *reverentia maritalis*, joined with *luctus et mœror*, was found not relevant to infer reduction of a deed granted by a wife when her husband was on his deathbed.² Nor will the 'frownings and other undue importunities of the husband,' unaccompanied by violence or positive threats, authorize reduction ;³ nor 'the fear of an awful answer and cruel husband.'⁴

The question, how far ratification by the wife will protect third parties against reduction at her instance, has been already considered ; and it is unnecessary here to do more than remind you of the observation of the Court in the case of Hay, that 'they act more cautiously who take such ratifications.'

Deeds extorted by creditors from their debtors, *metu carceris*, when such deeds are not confined to the debt on account of which the imprisonment has taken place, or is threatened, are reducible.⁵ Fraser's case had reference to an absolute disposition of lands ; and the right of the donee, who was likewise a creditor of the granter, was reserved to the extent of a security for any debt due by the granter to him. On this point, I refer also to the case of Tait,⁶ where a discharge by a married woman was reduced under special circumstances, one of which was that she was constrained to grant it by imprisonment. But the objection of *metus carceris* is not available if the deed, though granted in prison, whilst in fear of incarceration, is not in favour of the incarcerator, but of a third party, with whom there is no collusion.⁷ And incarceration, actual or threatened, on a legal warrant, is *vis legalis* ; and it is not unlawful for a creditor to take from his debtor a bond of corroboration, applicable solely to the debt in respect of which the imprisonment has taken place or is threatened, nor security exclusively for payment of that debt.⁸ The corroboration or security, however, must be strictly confined to the debt on account of which the imprisonment has taken place, or is threatened ; as to any further purpose, it will not be sustained.⁹ The distinction between the cases of corroboration or security, applicable exclusively to the particular debt, or going beyond that debt, is well illustrated in the case of Heriot.¹⁰

It is not essential that the violence or threats should operate bodily fear to the party who grants the deed sought to be reduced. Where an aged man was apparently in imminent danger of violence, a bond granted by his son, in order to procure his father's release, was reduced.¹¹ And the

¹ Woodhead, 24th July 1662, M. 10,281.

² Murray, 24th Jan. 1674, M. 16,488, and 6525.

³ Johnston, 1st July 1708, M. 16,511.

⁴ Hepburn, 16th June 1613, M. 16,482. See also Elibank, 11th July 1821, 1 Sh. 117.

⁵ Arrat, 23d March 1718, Robertson's App. 234 ; Bell, 24th Feb. 1762, M. 16,515 ; and Fraser, 13th Dec. 1810, F. C.

⁶ Tait, 4th June 1831, 9 Sh. 680.

⁷ Pringle, Dec. 1682, 2 Br. Sup. 27.

⁸ Bishop of Ross, 30th June 1670, 2 Br. Sup. 479 ; Ker, 9th Dec. 1698, M. 16,503.

⁹ Burnet, 18th Feb. 1680, M. 16,494.

¹⁰ Heriot, March 1682, M. 16,496 ; Nisbet, 18th Dec. 1708, M. 16,512.

¹¹ M'Intosh, Dec. 1671 and June 1672, M. 16,485-6.

fear need not be of violence or bodily harm. Thus an obligation, granted to one in *liege poustie*, by his heir, through fear of being disinherited, binding the heir not to reduce any deed or settlement which his relative might make on deathbed, was held not to preclude the heir from setting aside a deathbed deed to his prejudice.¹

The plea of *vis et metus* is available, not only against the offending party, but also against onerous third parties.²

¹ Inglis, 4th Dec. 1733, M. 3327.

Wightman, 6th Dec. 1787, M. 1521 ; and

² Willocks, 26th Nov. 1776, M. 1519 ; Fraser, before referred to.

TITLE VII.

HOMOLOGATION AND *REI INTERVENTUS*.

CHAPTER I.

THE principle on which a deed receives effect is, as already explained, that it expresses the intelligent and deliberate consent of the party who grants it; and the necessity for intelligent and deliberate consent, in order to make a deed valid, is the ground on which pupils and certain other classes of persons are wholly, or to a certain extent, under disability as to granting deeds.

But what is wanted in all cases is *consent* from a qualified party. If such party will not express his consent otherwise than by a formal and duly authenticated deed, the law will hold him free until he has executed such deed; but if, waiving the protection afforded by the law in that particular, he takes some way of his own to express his consent, the law does not insist on the strictly formal mode being adopted. The essential is the consent, which will be taken from a qualified party, in such competent, but of course distinct and unequivocal, way as he chooses to give it. Hence the doctrine of Homologation (literally 'saying the same thing'), which, as far as concerns the department of Conveyancing, is the subsequent approval of a deed in itself imperfect or null, for want of the legal solemnities, or through the incapacity of the parties, or in respect of fraud, or on some other ground.

The doctrine of homologation applies with especial force to the case of a contract of marriage, on the faith of which marriage has followed. Where it was attempted to reduce a marriage-contract, in respect of certain alleged defects in the solemnities of authentication, the Court unanimously sustained the contract; Lord Gillies observing that, 'when a marriage has been solemnized on the faith of an antenuptial contract, it is not enough to allege defects in the solemnities of deeds in order to warrant a reduction; there must be actual forgery of the deed libelled to make the ground of reduction relevant.'¹ In an earlier case, an ante-

¹ Falconar, 14th Jan. 1830, 8 Sh. 312.

nuptial contract, signed by the husband and the wife's father, but not by the wife herself, was held binding upon all concerned, including the wife, to the effect of making a discharge of her claim of terce, contained in the contract, good against her, although she had not signed the deed. The want of her signature seems to have been accidental, and her connexion with the deed, and the identification of the deed as the contract on which the marriage had followed, were sufficiently established.¹ The lady's connexion with the contract is of course essential, otherwise even marriage could be no homologation on her part. Accordingly, proposals of marriage,—given by the intended husband to the bride's brother, a lad of fourteen years of age, who stated that he had not approved them, nor shown them to his father or sister, and with which there were apparently no grounds for connecting either of these parties,—were not considered as a marriage-contract, notwithstanding the subsequent marriage.²

But deeds of every kind, in themselves lawful, may be made obligatory by homologation, though wanting in the prescribed solemnities. A bond, in which one of the witnesses was not designed, was sustained, in consequence of the debtor paying interest, and half the principal, and raising a process of suspension as to the other half.³ A submission by a wife, regarding her heritage, to which there was only one witness, was sustained, because her husband appeared and pleaded on her behalf before the arbiter. The husband being the wife's administrator, his consent was held to imply hers.⁴ A will, neither holograph nor tested, was found to be homologated by a writing of the residuary legatees' subjoined to it, and by their taking possession of the testator's estate in terms of it.⁵

These cases have reference to deeds imperfect as regards the legal solemnities. But homologation will equally remove imperfections in other respects, provided always these do not amount to intrinsic nullities. For example, a deed by a minor, without consent of his curators, may be homologated after majority;⁶ or a deed by a married woman, by acts of approval done by her after she became a widow.⁷ A deed, open to reduction on the ground of fraud, may be homologated and rendered unobjectionable.⁸ And even the plea of *vis et metus* may be excluded by homologation.⁹ But a deed or act in itself unlawful, whether by Statute or at Common Law, cannot be made good by homologation. Consent, on which alone homologation is founded, is excluded in every form as to such deeds and acts. Moreover, a deed signed by one legally or naturally incapable of consent, as a pupil, or an idiot, is truly no deed, and cannot admit of homologation.¹⁰ Lord Moncreiff says, 'An act, in

¹ Wemyss, 16th Nov. 1760, M. 9174.

² Campbell, 5th June 1812, F. C.

³ Sinclair, 17th Feb. 1715, M. 5654.

⁴ Tailfer, 21st Jan. 1735, M. 5657 & 17,032.

⁵ Pollock, 20th November 1849, 12 D. 143.

⁶ Hume, 28th June 1671, M. 5688.

⁷ Mitchell, 10th Dec. 1672, M. 5711.

⁸ Dunbar, 16th Jan. 1672, 1 Br. Sup. 649; and M'Michan, 22d June, 1839, 1 D. 1085.

⁹ Grant, 11th July 1706, M. 16,509.

¹⁰ Erskine, iii. 3. 47.

itself null from its incompetency, cannot be homologated.’¹ This remark had reference to a summons signed by one who had no authority, and as to which there were other equally fatal irregularities, and which the Court held incapable of homologation. The case brings out clearly the principles on which homologation can take place, and those on which it is excluded. Lord Cringletie there says, ‘Parties are entitled to a ‘citation to appear in Court, and they may waive their right, and ‘appear without it. But there must be a summons to which the judge ‘must look, and without which he cannot entertain any action, as there ‘is no such proceeding as a defender being brought into Court *ob torto* ‘*collo*.’

ADOPTION.

But if the document, even when null as a deed, and incapable of homologation, is in an intelligible and precise shape, it may be made operative by adoption, which, though resembling homologation, has different results.²

Having regard to the principle on which homologation rests, it is obvious that the plea is available only when the party is aware of the existence of the deed said to be homologated, as also of his right of objection, and of the consequence of waiving such right. There can be no intelligent consent to that of which we are not duly informed. Thus, a party who had a right of legitim, of which she was entirely ignorant, accepted, for several years, the interest of a provision in her favour, made by her father, as in full of legitim. She was found not barred of her right to claim the legitim, and to repudiate the provision.³ The party who is to homologate and ratify an imperfect deed should have the fullest possible information given him regarding his legal rights, and the effect of his executing the proposed ratification, and full time to deliberate, and obtain advice as to the course he ought to take, more especially if he is young, and not experienced in business. In the case of Murray,⁴ the right of reduction of a deathbed deed by his predecessor was found not barred to the heir-at-law by a deed granted by him during his predecessor's lifetime, whereby he renounced his legal rights; nor by another deed executed subsequently to the predecessor's death, ratifying the former one; the heir having just attained majority, being imperfectly educated, little, if at all, informed of his legal rights, and without the assistance of any law-agent or adviser.

The acts on which the plea of homologation is founded ought to imply acquaintance with the contents of the deed homologated; and the mere subscribing as witness to a deed does not, in general, infer the witness's homologation; because witnesses simply attest the party's subscription, and in general are not informed of the contents of the deed which they subscribe as witnesses. But where the deed is a marriage-contract, and the witness the bride's father or brother, a presumption

² Cumming, 19th Nov. 1833, 12 Sh. 61.

³ Bell's Commentaries, i. 145.

⁴ Johnstone, 29th Nov. 1825, 4 Sh. 234; see, to similar effect, Keith's

Trustees, 17th July 1857, 19 D. 1040; and Douglas, 28th June 1859, 21 D. 1066.

⁴ Murray, 21st Jan. 1826, 4 Sh. 374.

arises from the near relationship, that such witness both knew and approved of the contents of the deed, though he was only an instrumentary witness, and not a party to it.¹ It is of course essential also that the party approving shall be of full capacity. Where the act of approbation is itself invalid, it cannot be pleaded in supplement of defects in the original deed. Thus, there can be no homologation on the part of an idiot.² Nor are acts, which are beyond the legal power of the parties performing them, available to found the plea of homologation.³ Nor will acts done in minority be reckoned.⁴ Moreover, the power of homologation, competent after majority, may be stopped by creditors rendering the subject litigious.⁵ And a married woman is incapable, by herself alone, and without the consent of her husband, of homologating an informal or defective deed which she had granted previously to her marriage. The consent given by her, in the act of homologation, is as invalid and ineffectual as that in the deed homologated.⁶ On this principle, a bond granted by a female minor was held not homologated, by a subsequent recognition of it in her antenuptial contract of marriage, entered into while she was still in minority. Being still a minor, she was incapable by herself of homologating. It might be doubted whether her husband, at the time she entered into the marriage-contract, had any title to challenge; and there was no evidence of homologation on his part after the marriage.⁷

The approbatory acts on which homologation is pleaded must be clear and express—bearing no reasonable construction other than that they were performed by the party, from his approbation of the deed homologated; for no man is *in dubio* presumed to have the intention of binding himself.⁸ Thus, where an heir of entail had granted a lease, which was reducible as in contravention of the entail, the mere receipt of the rents, payable under the lease, was found not to bar the next heir of entail from reducing the lease. He ought, however, as a measure of prudence, and supposing him to be aware that the right of challenge exists, to insert in the rent-receipts a reservation of his right of reduction of the lease. This, though apparently not absolutely necessary, was done in the case of Malcolm.⁹ Again, deeds which parties are under obligation by law to grant,—such as charters to the heirs or singular successors of vassals, granted by superiors in obedience to a charge,—infer no homologation of the right of him at whose suit the charge is given.¹⁰ And the act inferring approval, if traceable to a powerful influence over the party, operating to take from the act the character of free consent, will not receive effect. Hence the subscription by an heir, as instrumentary

¹ Davidson, 15th July 1714, M. 5652; Johnston, Feb. 1725, M. 5657.

² Morton, 11th Feb. 1813, F. C.

³ Stein's assignees, 2d June 1829, 7 Sh. 686; as reversed, 23d Feb. 1831, 5 Wil. & Sh. 47.

⁴ Brodie, 6th July 1827, 5 Sh. 900.

⁵ Harkness, 20th June 1833, 11 Sh. 760.

⁶ Erskine, iii. 3. 47.

⁷ Rose, 20th Nov. 1821, 1 Sh. 154.

⁸ Erskine, iii. 3. 48.

⁹ Malcolm, 19th June 1823, 2 Sh. 410.

¹⁰ Dunbar, 20th Dec. 1662, M. 6715.

witness to a deed of his ancestor on deathbed, is presumed to have proceeded not from his approbation of the contents, though he should be supposed to know them, but from the authority and influence which the granter had over him, and his fear of offending. Therefore such subscription does not infer homologation.¹ But when a party accepted the office of trustee under his father's settlement, and took payment of a small legacy thereby bequeathed to him; he was held to have homologated the settlement, so as to be barred from claiming legitim in opposition to its provisions.²

**EFFECT OF
HOMOLOGATION.**

We have now to consider the legal operation of homologation. There is a deed or obligation existing, though open to reduction or challenge, and the homologation has a retroactive effect, making it good from the first.³ Such deed will have the same effect against the party homologating it, and those who are bound by his acts, as if it had been valid from the beginning. But the homologation is simply his act, and, in relation to those who are not bound to acknowledge his acts, it can have no effect,—for example, in relation to heirs of entail not representing the party otherwise than as such. The deed or obligation continues liable to exception on the part of such heirs, as much as if no homologation had taken place.⁴

But the effect of homologation or ratification may be qualified or suspended by a protestation timeously taken. Thus, a wife, who was creditor to her husband by marriage-contract, was found not barred from claiming payment of her debts out of his estate, by having signed as consenter to his testament, though she had ratified the testament; she having done so under protestation that she reserved her rights as creditor.⁵ Approbatory acts, however, though partial, will infer homologation of the whole, where there is no protestation.⁶ But where there were two testamentary writings, not so framed as to constitute one and the same settlement, nor having any common or combined object—no bond of union tying them together,—but which were respectively capable of being carried into effect without reference to each other, it was held competent for parties to approve of, and take interest under, the one, and at the same time object against the other.⁷ In such cases the party does not approbate and reprobate the same settlement. No one can legally do so in the case of one and the same deed. He homologates that of which he claims the benefit, with all its qualities; and only objects to a separate writing which (as alleged) it was not lawful to grant, or which was not lawfully granted; and which, were it sustained, would deprive him of a legal right otherwise competent to him.

**EFFECT OF
ADOPTION.**

The adoption of a deed which is in itself absolutely null operates differently from homologation; for, whereas homologation draws back

¹ Dallas, 13th Jan. 1704, M. 5677.

² Carmichael, 8th Feb. 1823, 2 Sh. 198.

³ Bell's Commentaries, i. 145.

⁴ Erskine, iii. 3. 49.

⁵ Murray, 12th July 1671, M. 5689.

⁶ Muir, 19th Feb. 1663, M. 6107; Hume, 28th June 1671, M. 5688; and Carmichael, before referred to.

⁷ Dow, 11th March 1856, 18 D. 820.

to the date of the deed approved, adoption is truly the making of a new deed, not the confirmation of an old one. The document adopted is in itself a nullity. The adoption, no doubt, gives it force; but not retrospectively, for there is nothing to which to draw back. There is, however, nothing to prevent the adoption from being specially so conceived as to operate retrospectively, just as a new deed could be so framed and expressed. Of course, what has been said as to the state of the party's information and capacity, in reference to homologation, is equally applicable to adoption; and the act of adoption must be at least as clear and unequivocal, and as free from undue influence as that of homologation. Of course, also, there may be partial adoption, even more easily than partial homologation.

There is a case of homologation or adoption, in respect to which I think the present a good opportunity to offer a suggestion. When a person of unsound mind is placed under judicial curatory, the rule of the Court is to realize all outstanding stocks and shares in trading companies belonging to him, and to have the proceeds invested either in the Government funds, or in heritable security. The investment thereof can make no difference on the right of succession to such person, if he remains of unsound mind till his death; because such investment is the act of the curator only, under order of the Court, not of the party; and the curator cannot regulate or affect the legal rights of the party's heirs and successors. But, supposing the party to convalesce, he may take over or adopt the investments made for him, whereby a material difference may be made upon the rights of his representatives; the whole of his estate, in fact, may thus become descendible to his heirs in heritage, to the exclusion of his next of kin, or heirs in moveables; the latter being the heirs who would have succeeded, in case no change of investment had taken place. It will, therefore, in general, be the duty of a legal adviser to point out this result to the party, so that, at all events, he may not be left in ignorance of the altered rights of his heirs, arising from the new mode of investing his estate.

CHAPTER II.

I NOW pass to the consideration of the plea of *Rei Interventus*, as REI INTER-
VENTUS. excluding the reduction of, or objection to, a deed or writing.

So long as both parties to any transaction have not finally bound themselves, it is a general rule that each has *locus pœnitentiæ*; it is free and open to either to resile.¹ But if there has been *rei interventus*, that is, if there have been proceedings not unimportant on the one side, known

¹ Erskine, iii. 2. 3; *Montgomery*, 28th Jan. 1663, M. 8411.

to and permitted by the other to take place, on the faith of the agreement, as if it were concluded; and if these are unequivocally referable to the agreement, and productive of alteration of circumstances, or of loss or inconvenience, in the event of the agreement not being carried through, a personal exception is created against the party permitting them, who no longer has *locus penitentie*. The transaction must be carried out.¹

It is not necessary that the party, against whom the plea is directed, shall derive benefit from what is done. It is enough when, by his conduct, he has placed the other party in circumstances whereby such other party's interest would suffer, if the agreement were not implemented.² On this principle, an improbativè cautionary obligation was found binding, because on the faith of it a party had been released, after having been apprehended as *in meditatione fugæ*.³

In Hamilton's case, a bond of annuity had been granted by three parties, jointly and severally, but, owing to a blunder in completing the testing clause, the bond was improbativè as to two of them. One of these two had died; the other had been present when the advance of the price of the annuity was made in exchange for the bond, if indeed the money had not actually been received through his hands; and he had acted as agent of the debtor in paying several years' annuities due under the bond. In these circumstances, the plea of *rei interventus* was held to preclude him from founding on the technical defect in the bond; although it did not appear that the same exception was equally applicable to the other party, as to whom also the bond was improbativè. On the same principle, a bond in the English form (which was improbativè by the law of Scotland), being executed in Scotland by several Scotch obligants, one of whom was the principal debtor, and the others truly cautioners, though nominally principals, was held binding on the cautioners; they having signed and issued the bond to the lender, as binding on them, and he having advanced the amount of the loan on the faith of the bond.⁴ In the same case, it had previously been held that the cautioners' acknowledgment of their subscriptions as genuine did not, *per se*, obviate the objection to the deed as improbativè under the Statute of 1681, cap. 5.⁵ This case suggests that, in reference to personal obligations and contracts, parties domiciled in Scotland should always be bound by deeds executed and attested in the Scotch form, and parties domiciled in England by deeds in the English form. In some cases, indeed, it may be expedient to have both forms observed as to all the obligants, whether Scotch or English.

And here, with reference to the execution of obligations by parties domiciled in England, it may be stated, on the authority of the opinion of eminent English counsel, that a personal obligation executed by an

¹ Bell's Principles, s. 26.

² Hamilton, 22d Jan. 1836, 14 Sh. 323; affirmed 12th Feb. 1838, 3 Sh. & M'L. 127.

³ Dunmore Coal Company, 1st Feb. 1811, F. C.

⁴ Church of England Fire and Life Assurance Co., 17th July 1857, 19 D. 1079.

⁵ Same party, 12th Feb. 1857, 19 D. 414.

Englishman under seal, and attested according to the English form, would have this advantage over a similar obligation not under seal, that, in the event of the death of the granter, the holder of the obligation under seal would be what is called a 'specialty creditor,' and, as such, would be entitled to a preference over 'simple contract creditors' in the distribution of the deceased's 'legal assets,' as contradistinguished from his 'equitable assets.' There would, I understand, be no preference in virtue of the seal and English attestation in suing the obligant whilst living, or in a ranking of the creditors on his estate, if he should become bankrupt while living. The advantage arises only in case of proceedings having to be taken after the obligant's death. The effects falling under the description of 'legal assets,' I understand, usually form a large portion of a deceased debtor's estate.

It may be added, that in preparing obligations in favour of Scotch parties, where one or more of the obligants may happen to be domiciled in England, I think it advisable to get each obligant both to subscribe and to affix his seal to the deed, in presence of two witnesses, making the witnesses subscribe, in the first place, according to the usual Scotch form, that is, set down their Christian names and surnames, with the word 'witness' added. The English docquet or certificate is then added, which runs in these words:—'Signed, sealed, and delivered by the above-named A. B. (party), in the presence of C. D., etc. (witnesses),' and the witnesses write their Christian names, surnames, and designations or descriptions under that docquet, just as if they had not subscribed as witnesses in the Scotch form. In that way the deed obtains a complete Scotch and a complete English execution, each independent of the other. The testing clause, as I shall afterwards notice, is in the usual Scotch form, with the addition that it notices the fact of the sealing.

I have called your attention to the case of the above class of deeds, because we already have, and we may expect in future to have, more and more, occasion to superintend the completion of deeds to which Englishmen as well as Scotchmen are parties. But my main object in doing so is to make you aware that, in certain cases, sealing, with the English attestation, will confer advantages. It need scarcely be added that the utmost caution must be observed in reference to the execution of deeds in the English form, and that it may very often be indispensable in such cases to obtain the assistance of English law advisers.

There is a recent case in which a contract to feu lands, in itself incomplete, was held to be a binding agreement by *rei interventus*, and the feuar was found not entitled to resile. The feuar had been tenant of a large portion of the subjects which he feued, and he endeavoured to ascribe his possession, and his acts of interference with the property, to his lease; but he had built a porter's lodge, made a new and expensive approach to a mansion-house situated on the lands, altered a public road, and done other acts which, the Court held, could not be ascribed to a right of mere tenancy. The extent of the subject feued, the rate of

feu-duty, and other essentials to a bargain, had been set forth in correspondence and other documents, and only some minor conditions remained unadjusted; the Court therefore held that *locus penitentie* was gone, and that there was a concluded bargain; and they made a remit to a law-agent to complete and adjust the terms of the feu-right.¹ This case related to a feu-contract, on which possession had followed; and, when possession of the subjects of a lease follows on an informal missive or minute of tack, such *rei interventus* will in general make it impossible for one of the parties to draw back against the will of the other. When possession has followed on such missives and minutes of tack, it is not necessary that the documents should be formally executed.² This principle operates, though only one of the parties has subscribed the informal missives.³ Where informal missives of lease of a farm were exchanged, and were followed by possession, but the possession was prior to the term of entry specified in the missives, a question was raised whether such possession would support the plea of *rei interventus*.⁴ But when, in contemplation of the lease, improvements have been made on the subjects under the eye and observation of the proprietor, the plea of *rei interventus* will give effect to an irregular missive, though no possession has followed.⁵ And where a capital sum, called a grassum, had been paid, effect was given to a verbal stipulation as to the term of endurance of a lease, the missives being silent as to the endurance.⁶ But where the missive is silent as to the term of endurance, and the tenant cannot prove that any particular term was agreed on, the lease is good for a year only;⁷ and the expenditure of money in meliorations, though made by the tenant in the *bonâ fide* belief that he was entitled to hold for nineteen years, and with the landlord's knowledge, will not authorize any claim upon the landlord.⁸ On the principle of *rei interventus*, a verbal promise by a father to pay a tocher with his daughter, followed by the daughter's marriage, was held relevant and admitted to proof.⁹ A verbal promise by a superior, to one about to buy lands, to grant him an entry gratis, was found binding after the intended purchase of the lands was completed.¹⁰ The verbal agreement for a nineteen years' lease was also made binding by the payment of a grassum, and considerable expenditure in improvements.¹¹ Even verbal agreements for the sale of lands have been admitted to proof, and sustained in consequence of *rei interventus*, the acts upon which that plea was founded being various.¹²

The same principle was recently applied as to a feu-right, verbally granted, in virtue of which the feuar had taken possession, built houses, and paid feu-duty. There was no question as to the extent of the sub-

¹ Colquhoun, 20th March 1860, 22 D. 1035.

² Grant, 10th July 1788, M. 15,180.

³ Countess of Moray, 23d July 1772, as reversed, 24th March 1773, 2 Paton, 317; Macpherson, 12th May 1815, F. C.

⁴ Pratt, 18th Nov. 1858, 21 D. 19.

⁵ Murdoch, 18th June 1812, F. C.

⁶ Macrorie, 18th Dec. 1810, F. C.

⁷ Clark, 27th Jan. 1816, F. C.

⁸ Thomson, 8th Feb. 1859, 21 D. 453.

⁹ Nicholson, 11th June 1829, 7 Sh. 743.

¹⁰ Gordon, Dec. 1674, M. 8415.

¹¹ Macrorie's case.

¹² Earl of Kinghorn, 23d July 1674, M. 8414; Thomson, 5th Dec. 1699, M. 8426.

ject, or the rate, or amount of feu-duty ; and the Court held the feuar entitled to a feu-right of the most simple description, and specially not containing certain clauses desired by the superior for regulating the uses of the ground and erections thereon.¹ And, on the same plea, effect was given to a verbal agreement between two of three co-heiresses, fixing the proportion to be paid to one of them of the price of the joint property, after purchase thereof by the other.² But, though a lease for a term of years, or a sale or feu-right of lands may be constituted by verbal agreement followed by *rei interventus*, and though the acts establishing the plea of *rei interventus* can be proved *prout de jure*, the verbal agreement itself can be proved only by writing or oath of party.³

Questions of difficulty, and occasioning a great deal of trouble, often arise under irregular missives of lease made binding *rei interventu* ; and it will in general be found a great advantage, both to landlord and tenant, not to delay the preparation of the actual lease till the bargain is completed, but to have the full draft or form of the deed prepared before missives are exchanged. The missives will then refer to this full draft, which should be signed as a relative document ; and the two papers together will contain the entire terms and conditions of the lease, to the exclusion of all cavil or question afterwards. I prefer a full draft to mere conditions, because the draft gives the *ipsissima verba* of the deed which the parties are to sign.

¹ Smith, 7th June 1860, 22 D. 1158.

² Moodie, 5th July 1745, M. 8439.

³ Gowans, 18th July 1862, 24 D. 1382 ; Walker, 20th Feb. 1863, 1 Macph. 417.

TITLE VIII.

THE STAMP LAWS.

THE Stamp Laws, in their relation to Conveyancing, form the subject of this Lecture.

It is not intended to go into any history of the Stamp Acts, or statement in detail of the particular duties they impose. It is proposed only to point out the general object and scope of the Acts; the principles on which the duties in general are assessed, and the leading rules applicable to cases in which the provisions of the Acts have not from the first been duly observed.

It is necessary to keep in view, as bearing on the whole subject, that the Stamp Acts are Revenue Laws, having for their object to raise a tax for the use of the State, but nowise to create new solemnities in connexion with the execution of deeds. This object is accomplished by appointing that the paper or parchment, on which the deeds or writings liable in duty are written, shall be impressed with a die or stamp, or, in certain cases, shall have an adhesive stamp or label affixed, denoting the amount of the duty. For enforcing the observance of this appointment, the Acts provide that no deed or instrument, liable in stamp-duty, shall be pleaded or given in evidence, or admitted to be good, useful, or available in law or equity, until duly stamped. The duties are placed under the charge of the Commissioners of the Inland Revenue, by whose orders the proper dies or stamps are impressed, and adhesive stamps or labels are issued.

GENERAL RULE. As a general rule, no deed or instrument is liable in stamp-duty unless it is fairly embraced within the provisions of the Stamp Acts. It will be found, on examination, that not many of those writings with which we are conversant in Scotland are now free from the operation of the Acts; but it is not a little satisfactory to observe, that the more burdensome duties are, in most cases, imposed more uniformly than formerly in the ratio of the amount or value of the subject-matter of the deed; and also that, in various departments, the amount of the duties appears to have reached its maximum, and to be now in the way of diminution.

Another material and comparatively recent amendment, in the provisions of the Stamp Acts, consists in the opportunity now given to ascertain beyond all doubt whether a deed is duly stamped, or is not liable to stamp-duty, and to be relieved of all risk of question on such points. The Acts, generally, have been framed without sufficient regard to Scotch law terms, and, partly from that cause, difficulties arise from time to time as to the proper stamp-duty payable on a particular deed. Until the year 1850, we were at great disadvantage on such occasions; as the authorities at the Stamp Office said truly they had no power to settle doubts; and, at the same time, parties, however willing to observe the law, were liable to all the consequences of breaking it, if they should happen to misconstrue the Acts. But that difficulty has now been removed. The Acts 13 & 14 Vict. cap. 97, sects. 14, 15, and 16 & 17 Vict. cap. 59, sect. 13, give power to the Commissioners, upon receipt of a fee of ten shillings, denoted by what is termed an 'adjudication stamp,' to assess the stamp, or to declare that no duty is exigible. Their opinion, if acquiesced in, is conclusive; if objected to, an appeal to the Court of Exchequer is competent.

The first Stamp Act in England was that of 5 & 6 William and Mary, cap. 21; the first embracing Scotland in its application, 8 Anne, cap. 9 (see sect. 32, *et seq.*), which imposed duties in Scotland on the somewhat dissimilar articles of indentures of apprenticeship and candles. That Act was followed by one of more extensive application, 10 Anne, cap. 19, the provisions regarding stamps beginning with sect. 100.

The leading Act now in operation is that of 1815 (55 George III. cap. 184), but, as regards both the amount of certain duties, and other particulars, its provisions have been largely modified by subsequent Acts.

The duties are of several classes, the principal of which are—

DUTIES.

(1.) Those assessed *ad valorem*, that is, in scales, graduated with reference to the amount or value of the consideration paid for what is contained in the deed; or the amount or value of the obligation thereby granted; or of the estate or fund thereby affected.

(2.) The duty known as the ordinary deed-stamp of thirty-five shillings, and which is very familiar to us.

(3.) We have a class which may be called denominational duties, as being applicable to all deeds or instruments of certain particular names or classes.

(4.) Progressive duties, arising in cases where the deed or instrument contains more than a certain number of words. And

(5.) Uniform duties, applicable to drafts or orders for money payable on demand, receipts for money paid, and some other matters; with the great convenience of being enabled to attach the stamp, by means of an adhesive label.

I shall now call your attention to some particulars, connected either with the operation of the Acts generally, or with the duties of the above

classes respectively ; observing, however, that the Acts are numerous, and their details very minute, and that as, with reference to the framing of deeds, no one ought to proceed without book, so, in regard to the stamp, no one ought to trust to memory. The Acts, or a trustworthy digest, should always be at hand for reference.

Deeds, especially as regards the duties assessed *ad valorem*, are liable, not according to their technical characteristics, in a conveyancing point of view, but according to the real nature of the transaction, or of the several transactions which they record, or of which they are the legal evidence. A deed, which we describe correctly by one technical name, is thus frequently chargeable with the same duty as that affecting a deed bearing a different name. Some deeds which, in strictly correct conveyancing, are described by one and the same name, and which contain obligations of the same character, are chargeable differently according to the origin of the transaction which they embody : and some which embrace several distinct obligations, or several purposes not necessarily connected with each other, will be found chargeable under several separate heads, not with double duties, but with duties of two or more denominations.

I will now point out a few cases in which the rule or principle here stated operates. Thus, under the general title 'Conveyance,' in the schedule, Part I, annexed to the Act of 1815, and in the schedules of some other Acts, *ad valorem* duties are imposed, affecting not merely deeds which, in technical language, are called 'conveyances,' but generally all grants, dispositions, leases, transfers, and renunciations upon the sale of any lands or other property, real or personal, or of any right or interest therein. The great test of liability to the 'conveyance' duty is, that the transaction in respect of which the deed is executed is of the nature of a sale of a property, real or personal, or of some right or interest therein. The assignation of a debt constituted by bill, decree, or the like, though granted in implement of a sale and for a price, is not considered a conveyance of property, real or personal, in the sense of this clause. The subject conveyed is technically called a 'chase in action.'¹

A bond of annuity granted without the payment of any price, and not redeemable, is liable in the *ad valorem* duty on bonds of annuity, according to the amount of the duty payable. But, if the bond is granted on the sale of an irredeemable annuity, it is liable in the *ad valorem* 'conveyance' duty corresponding to the price paid for the annuity. If, on the other hand, the bond of annuity is redeemable, it will be considered, so far as regards the stamp-duty, as on the same footing with a bond or mortgage, for payment of a capital sum equal to the amount of the redemption money.² Again, the *ad valorem* duty on a deed of sale of property is not affected by the circumstance of part of the price or consideration money not being actually paid, but created or allowed to remain a debt of the purchaser, or affecting the subjects sold. The price

¹ See King, 18th December 1844, 6 D. 228.

² 5 & 6 Vict. c. 82, s. 2 ; and 13 & 14 Vict. c. 97, schedule.

undertaken to be paid fixes the amount of the *ad valorem* duty in such case; and accordingly the amount of any debt, under burden of which the property is conveyed, is to be computed as part of the price. This rule holds although the purchaser undertakes no personal liability for payment,¹ in the same way as if the amount of the debt had been actually paid to the seller; and, moreover, if the debt is made a real burden on the property, the deed then becomes, besides a conveyance, equivalent to a mortgage, and the duty applicable to a mortgage for the amount of the debt so made a real burden is payable, in addition to the full 'conveyance' duty.

But, if there be only one transaction, there may be several obligations in one deed, or even, in certain cases, several separate documents, and only a single stamp-duty. Thus, when a loan is contracted on the security of a personal bond by a husband and a disposition in security thereof by his wife, with his consent, of her property, there is only one transaction, and the stamp-duty is the same as that applicable to an ordinary bond and disposition in security.² Again, when the real transaction is that of a simple loan, obligations contained in the bond, granted in respect of the loan, for payment of premiums for insurance of the subjects of the security against fire, or for keeping up policies of life assurance, forming part of the security for the loan, do not affect the *ad valorem* stamp. These are rightly dealt with as accessory to the bond and security over the subjects, or the life policies. Moreover, when the primary purpose of a deed is the discharge of a debt, constituted by a personal bond, and the deed is duly stamped with reference to that purpose, it will be admitted in Court as evidence of the discharge, though it shall contain subordinate and accessory clauses, such as an obligation of warranty and consent to registration.³

On the principle that the *transaction* is what is looked to, it has been decided that, however numerous the parties to a deed may be, one stamp is sufficient when the deed relates to one and the same subject-matter; as, for example, a contract of copartnery, the deed of constitution of a public company, the security by several co-obligants to the several creditors of an insolvent for payment of their respective debts.⁴ And, when an agreement is constituted by a series of letters, it is enough if one of the letters only is stamped with the duty effeiring to such agreement. But, on the other hand, though strictly on the same principle, if one and the same instrument contains two or more separate and distinct obligations, separate *ad valorem* duties are payable in respect of each obligation; for example, a marriage-contract, containing bond of annuity to the wife, and settlement or bond of provision to the children, is chargeable with the *ad valorem* duties, payable in respect of the annuity, and also those in respect of the settlement or bond of provision. The same

¹ 16 & 17 Vict. c. 59, s. 10.

² Brown, 3d December 1830, 9 Sh. 136.

³ Fleming, 17th June 1859, 21 D. 982.

⁴ Johnston & Co., 7th March 1801, M. App. Writ. No. 5.

rule is applicable to the case of a deed granted in consideration partly of an annual sum, partly of a capital sum paid or of stock transferred. Such deed is chargeable with the *ad valorem* duties exigible in respect of each of such considerations, except progressive duty.¹ Where, however, two or more separate matters or transactions are thrown together into one deed or instrument, a single stamp will validate only one of them. Thus, when two or more bills are protested, separate instruments of protest, or at least separate stamps, applicable to the protest of each bill, are required, even though the parties happen to be all the same.² Again, when there are two or more precepts of sasine, separate instruments of sasine, or at least separate stamps, are required, applicable to each precept, though the precepts and instruments are all in favour of the same person.³

Sales, or *quasi* sales, are often accomplished by means of feu-rights, or ground-annual rights, or long leases. In these cases, the consideration usually is not a capital sum or price paid down, but an annual payment. Where there is a price paid down, the deed is, and has always been, liable to the *ad valorem* 'conveyance' duty, corresponding to the amount of the price; but until a comparatively recent date there was no *ad valorem* duty payable on feu-rights, or ground-annual rights, in respect of the amount of the annual feu-duty or ground-rent, whatever the amount of such feu-duty or ground-rent might be; nor was the amount of the duty on leases affected by the length or endurance of the lease. But by the Act 17 & 18 Vict. cap. 83, special *ad valorem* duties are imposed on feu-charters, or feu-contracts, contracts of ground-annual, and leases, if for a term exceeding 100 years, on the same principles on which *ad valorem* duties are imposed on simple and proper conveyances. The duties on leases for 100 years, or shorter periods, are also chargeable *ad valorem*, but not on principles which require to be specially noticed here.

But, as connected with leases, it may be noticed that a tenant's consent, though in the form of an obligation, to remove from his possession without warning, is not liable in duty, provided the principal lease contains a similar obligation, and is duly stamped.⁴ The consent is held, in such case, as part or explanatory of the lease.

SETTLEMENTS.

Ad valorem duties are imposed on certain deeds under the general character of 'settlements.' The word 'settlements,' as used in the Stamp Acts, is an English law term, to which we have nothing exactly corresponding in Scotch legal phraseology; the same word, as used with us, being generally applied to testamentary or *mortis causa* writings. This duty attaches to marriage contracts, or deeds of that class, so far as definite and certain provisions in money, or in shares of particular stocks,

¹ 17 & 18 Vict. c. 83, s. 16. See also Wilkie, 5th March 1850, 12 D. 818.

² Barbour, 22d Jan. 1822, 1 Sh. 257; and 23d May 1823, 2 Sh. 328.

³ Mackintosh, 12th May 1831, 9 Sh. 583.

⁴ M'Laren, 17th Dec. 1831, 10 Sh. 163; Bain, 14th July 1852, 14 D. 1007.

or of any company or corporation, are thereby made irrevocably in favour of any one. But from the duty (on settlements) are exempted bonds, and other securities, operating as settlements, if charged with the *ad valorem* duties imposed by the Act of 1815;¹ deeds of appointment, in execution of powers given by other deeds; deeds merely declaring trusts, pursuant to previous deeds.

Among the classes of deeds chargeable with *ad valorem* duties, there are now placed awards, or decreets-arbitral, on which duties are imposed, according to the amount or value of the sum or subject in dispute.² It was at one time held, that an award or decret-arbitral, when written on the same sheet of paper with the submission (such paper being duly stamped as for the submission), did not require any further or additional stamp; but that rule must be held as inoperative. The submission will require the ordinary deed stamp of 35s., and the award the appropriate *ad valorem* stamp in addition. AWARDS.

As already stated, duties are imposed generally on deeds not otherwise charged, and not exempted. The Acts do not explain what is meant by the term 'deed.' Apparently, as here used, it is applicable to any writing, formal or informal, by which it is intended that, upon its execution, and at once, an obligation or right shall be constituted in favour of the grantee. In an English case,³ Mr. Justice Buller says, 'A deed must take place upon its execution, or not at all. It is not necessary for a deed to convey an immediate interest in possession, but it must take place, as passing that interest to be conveyed, at the execution. But a will is quite the reverse. It can only operate after death,' etc. In a recent Scotch appeal case, Lord St. Leonards⁴ speaks of a 'deed' as contradistinguished from a 'will;' and in a note it is said, 'That is, a deed *inter vivos*, as contradistinguished from a will, which by English lawyers is 'never called a deed.' On principle, therefore, wills and other testamentary instruments, and *mortis causa* dispositions, whether applicable to heritable or moveable estate, ought not to have been held liable in the duty now under consideration. But when such writings included, or were capable from the terms in which they were expressed of including, heritable estate, the Stamp Acts were construed as rendering them liable in the deed stamp-duty of 35s. That, however, is now altered by the Act 23 & 24 Vict. cap. 15, which, by sect. 7, specially enacts, 'That no will, testament, testamentary instrument, or disposition *mortis causa*, shall be chargeable with any stamp-duty.' This Act has not been allowed any retrospective effect. The old rule is held to apply in all cases of writings including heritable estate, and dated prior to the date of the Act. 'DEED' STAMPS.

The denominational stamps are those on charters by progress, or the short writs introduced in and since 1858 in lieu thereof, and instruments of sasine. They require no particular notice. Until a recent date, it DENOMINATION-AL STAMP.

¹ 55 Geo. III. c. 184.

² 23 & 24 Vict. c. 111; and 28 & 29 Vict. c. 96, s. 3; Schedule, *vide* Award.

³ Supplement to Jarman & Bythewood's Conveyancing, p. 111.

⁴ Brown, 1 M'Queen, 87.

was usual to write the notarial instruments introduced by the Conveyancing Acts of 1845, and subsequent years, on the same stamp as that used for instruments of sasine, which the notarial instruments had superseded. But it has now been decided that such notarial instruments are liable in the duty of 1s. only, being that chargeable on a 'notarial act.'

**PROGRESSIVE
DUTIES.**

The progressive duties on deeds, imposed by the Stamp Acts, come into operation, more or less, according to the number of words in the deed, or in any relative writing indorsed on it, and on schedules, or the like, annexed to deeds, but not indorsed. In calculating these duties, it is important to know the following particulars; viz.—(1.) That where deeds already duly stamped are annexed, and signed as relative to other deeds, no progressive duty is payable in reference to the number of words in such relative deeds. (2.) If a schedule is indorsed on a deed, the words in the schedule are reckoned along with those of the deed; and progressive duty may or may not be payable, according to the total number of words contained in the deed and schedule together. (3.) If a schedule is annexed, and not indorsed, progressive duty is payable, even though there might be none, if the document had been indorsed. (4.) If a deed is written on two or more separate sheets of paper, it is not enough that the full amount of duty which would have been exigible, had the deed been written on one sheet, shall be paid. The second, and every succeeding sheet, requires the appropriate progressive duty.¹

RECEIPTS.

The uniform rate of duty, viz., one penny sterling, is imposed on receipts for money paid, amounting to 40s. or upwards; but receipts by bankers for money deposited with them, or by any one for money to be accounted for on behalf of the payer, are exempt from duty. Thus, if money is sent by a constituent to his factor or agent to be placed to his account, the acknowledgment of receipt may be on plain paper, however large the sum of money may be.² When, however, the receipt operates a discharge to a third party, or to the payer, for the amount deposited, the corresponding duty is exigible. Receipts are exempt when indorsed on duly stamped bills, bonds, or other securities, for payment of the sum, or for any interest or annuity thereby secured.

**DRAFTS OR
ORDERS ON
BANKERS.**

The uniform duty of one penny is imposed also on drafts or orders payable on demand to any specified payee, or to the bearer.³ It is very necessary to see the provisions of the Stamp Acts as to drafts or orders on bankers faithfully observed; for, if a banker pays money on an unstamped order, it would seem that he will not be allowed to recover the amount from the debtor's cautioners or co-obligants, if there are any.⁴

It is important also to keep in view that promissory-notes, whether payable on demand or not, are liable in *ad valorem* duties, according to

¹ Nicol, 11th March 1841, 3 D. 890.

² 21 & 22 Vict. c. 20, s. 1; see Murison, 27th Jan. 1864, 2 Macph. 501.

³ 16 & 17 Vict. c. 59.

⁴ Swan, 5th Feb. 1835, 13 Sh. 403; as reversed, 6th July 1835, 2 Sh. & M'L. 67,

the amount contained in them, and the term or period of their currency, if any.

As already observed, few of those writings, with which we are generally conversant, are not embraced within the provisions of the Stamp Acts. The most important of those which are free are Crown charters by progress, and some other writs issued from the Queen's or Prince's Chancery. The appointment by a royal burgh, contained in a minute recorded in the council books, of a collector of local taxes, is valid without stamp;¹ also, mere acknowledgments of resting-owing, or 'I O U's, as these are generally written.²

I will here notice some cases in which writs are specially exempted from stamp-duty.

1. On grounds of public policy, bills of sale, or other deeds executed for the sale or transfer of ships, either absolutely or by way of mortgage, are exempted by the Merchant Shipping Act of 1854.³ But an ordinary personal bond and vendition of a ship in security requires the stamp applicable to a bond.⁴

EXEMPTIONS
FROM STAMP-
DUTY.

2. Dispositions *omnium bonorum*, granted under applications for the benefit of the Act of Grace, are exempted.⁵

3. Conveyances, and various other writings, relating solely to the estate of a bankrupt, are exempted by the Bankrupt Act of 1856,⁶ and previous Bankrupt Acts.

4. Appraisements of property for the legacy-duty are exempted.⁷ But when such appraisements are used for any other purpose, as, for example, in a claim of return of inventory or probate-duty, the appraisement-duty attaches.

The Stamp Acts, as already stated, are Revenue Laws, and are not intended to introduce any new solemnity in the authentication of deeds; and, consistently with that view, if a deed is written on a stamp of equal or greater value than the statutory amount, it will not in the general case be open to objection on the Stamp Laws, because the revenue has not been injured;⁸ unless the stamp used is marked as specially appropriated to any other instrument, in which case, as a general rule, it will be of no avail. The same cause, viz, that the Acts are Revenue Laws, makes it *pars judicis* to take notice of the want of the proper stamp, if a deed not duly stamped is founded on in any Court of Law. The stamp-duty is a debt due to the Crown. It is just as much the law of the land, that the duty shall be paid, as that the deed shall be enforced; and the user of the deed cannot ask the administrators of the Law to look at a deed which, on its face, bears that the law as to the stamp-duty has not

¹ Hunter, 11th July 1833, 11 Sh. 989; Aitken, 28th March 1861, 23 D. 838.

² Macpherson, 18th Feb. 1854, 16 D. 612; and Swan, already referred to.

³ 17 & 18 Vict. c. 104, s. 9.

⁴ Mories, 24th Nov. 1843, 6 D. 97.

⁵ See the Act 55 George III. c. 184: Schedule, part 2, s. 5; the Scotch Act

there referred to, 1696, c. 32; and Rae, 23d Feb. 1837, 15 Sh. 653.

⁶ 19 & 20 Vict. c. 79, s. 184.

⁷ 55 Geo. III. c. 184: Schedule, part 1, voce Appraisement.

⁸ 55 Geo. III. c. 184, s. 10; Bowack, 21st June 1804; M. App. Bill of Exchange, No. 16.

AFTER-
STAMPING.

been observed. The parties to a cause, therefore, cannot, either by silence or express consent, waive the objection to a deed, that it is not duly stamped. That matter is not within their power.¹ But it would be a great oppression to make deeds in general irrevocably null for want of the proper stamp; and the Stamp Acts, as a general rule, allow the after-stamping at any time of deeds which at first are unstamped, or insufficiently or unduly stamped, with or without payment of penalties, according to circumstances. No penalty is exacted when the Commissioners are asked to apply the proper stamp to a deed, executed in the United Kingdom, within two months from the first date of its execution. And, when the deed is executed out of the United Kingdom, the like rule is followed, if duty is paid within two months after its arrival in this country.² Under other circumstances, as a general rule, penalties are exigible, varying in amount; and in the particular case of 'Conveyances,' which are chargeable with *ad valorem* duties, very special sanctions have been introduced, to which it is necessary here to refer.

The *ad valorem* duties are imposed according to the amount of the price or consideration stated in the deed; but the duty in this case was for some time largely evaded, by the omission to specify in the deed the amount of the price or consideration given for the same. To prevent evasion in future, the Act 48 George III. cap. 149, which came into operation from and after 10th October 1808, appointed the full price or consideration to be stated, with this provision, that so much of the true consideration as should not be expressed should be recoverable by the purchaser from the seller, with double costs of suit; and if the under statement should affect the amount of the *ad valorem* duty, the agent knowingly setting forth a false consideration is liable to forfeit £500, to be disabled from practising, and, if he holds a public office or employment, to forfeit and be incapable of holding the same.³

When executed deeds, which the law allows to be after-stamped, require to have stamps impressed on them, they must be given in for that purpose to the Stamp-Office in Edinburgh or London. When the document is not executed, it can be dealt with as above, or transmitted to Edinburgh or London through any branch stamp-office in the country. The proper amount of duty, and, in the case of the executed deed, of the penalty, if any, requires to be paid when the deed or document is given in at the head or sub-office. When deeds not duly stamped, and which are allowed to be after-stamped, are judicially founded on, the Court usually sist process till the proper stamp is impressed;⁴ and, when the unstamped deed has been registered, the Court will grant warrant to the Keeper of the Records to transmit the principal deed from the Register House to the Commissioners of Stamps in London to be stamped, on

¹ Cadzow, 4th Jan. 1830, 5 Murray's Jury Court Reports, 98.

² 13 & 14 Vict. c. 97, ss. 12, 13.

³ See the Act of 1808, 48 Geo. III. c.

149, ss. 22, 23, 24, 25, 26; and 1815, 55 Geo. III. c. 184, s. 8.

⁴ Church, 8th March 1843, 5 D. 876.

security being given for its due return to the Register.¹ But, in reference to deeds and instruments which have only a brief temporary currency,—as to some of which a modified rate of duty has in consequence been imposed,—a different rule has been thought necessary; for, if these could be stamped at any time, it would be found that, in the great majority of cases, the stamp would not be required at all; the instrument would serve its passing purpose without stamp, and the revenue would suffer. Accordingly, we find exceptions or modifications of the above general rule in the following cases :—

1. Bills of exchange and promissory-notes, or other notes, drafts, or orders, liable in duty. These writings generally have a short currency. The Act 31 Geo. III. cap. 25, sect. 19, expressly prohibited the affixing of the stamp after the instrument was engrossed; but by 37 Geo. III. cap. 136, sects. 5, 6, it was enacted that when bills or notes were written on stamps of equal or superior value to those required by the previous Act, though of a different denomination, the Commissioners should have power to stamp them with the proper stamp, with the effect of making them of equal force as if they had been duly stamped. If produced before being payable, a penalty of 40s. is exigible. If not till afterwards, the penalty is £10, besides the appropriate duty in either case. Except in the above case, a bill or note unstamped, or not duly stamped, is absolutely null; and the nullity is not removed by the party's admission of his signature to it.² It is of importance to keep this in view, in reference to acknowledgments of debt, and to exclude from them any promise to pay; because, if such promise is inserted, the document will be held a promissory-note, and, being without stamp, will be inadmissible, even as evidence of debt.³

2. Policies for sea-insurance, likewise, are null if not stamped when written, and the Commissioners are prohibited from stamping them, by 35 Geo. III. cap. 63, sect. 14. But when an additional risk, requiring the payment of further duty, is written upon a policy duly stamped with reference to the original risk written therein, the policy can be stamped with the further duty.

3. Agreements, the duty on which is now reduced to a low amount, can be stamped within fourteen days without penalty; after fourteen days the penalty is £10,⁴ unless the value of the subject-matter be £5, and under £20; in which case the penalty is only 20s.⁵

4. Receipts and discharges, bills of lading, and charter-parties, cannot be stamped after expiry of one calendar month from their date.⁶ Receipts and discharges can, however, be stamped within a fortnight after date, on payment of a penalty of £5, and within a month on pay-

¹ Laidlaw, 21st Jan. 1840, 12 Jurist, 271.

² Greenock Bank, 12th December 1834, 13 Sh. 190.

³ Menzies, p. 97; M'Intosh, 13th May 1830, 8 Sh. 739; Alexander, 26th Feb.

1830, 8 Sh. 602; Scott, 19th Feb. 1835, 13 Sh. 490.

⁴ 7 & 8 Vict. c. 21, s. 5.

⁵ 23 & 24 Vict. c. 15, s. 15.

⁶ 35 Geo. III. c. 55, s. 11; and 5 & 6 Vict. c. 79, s. 21.

ment of £10; and bills of lading and charter-parties can be stamped, without penalty, within fourteen days, and on payment of a penalty of £10 after fourteen days, and within one month after date; the appropriate duty being of course payable in either case.

5. Indentures of apprenticeship to a Writer to the Signet, solicitor, agent, or procurator, in Scotland, can be stamped at any time, on payment of penalties, graduated according to the distance of time between the date of the deed, and the date at which the stamp is applied for.¹

6. The proxy for voting at one particular meeting of the shareholders of any one of certain classes of public companies, meeting of the heritors of a parish, and some other meetings, cannot be after-stamped.²

The Stamp Acts declare that deeds liable in stamp-duty shall not be admitted to be available until duly stamped. But by 17 and 18 Vict., c. 83, sect. 27, unstamped instruments are declared admissible as evidence in any criminal proceeding. The ends of justice would have required this modification of the original law on that point, if the Acts had been understood or construed so as to preclude the use of unstamped writings in criminal cases. I believe the alteration was necessary in England. It was not so in Scotland, where it has long been fixed that documents could be founded on as evidence in criminal cases, though not on the proper stamp.³ The objection, however, founded on the want of the stamp, though applicable when the document is pleaded on as a deed, does not reach even the same document, and though still unstamped, when it is founded on for collateral effects; for example, in evidence of a fact.⁴ In *Erskine's* case, counsel said, 'in the Court of Session, we rested on this as giving a good right, in which case it must be stamped; but here we merely rest on it as a letter,'—and that was allowed to be done. How far the same rule can be extended to a promissory-note, not properly stamped, and which is offered as part of the evidence of a loan-transaction, was questioned, and not decided, in the case of *Pilling*.⁵

EFFECT OF
AFTER-STAMP-
ING.

In regard to the effect of after-stamping, in cases where it is competent, the Act 37 Geo. III. cap. 136, sect. 2, declares that instruments, after being stamped, shall have the like force and validity as if the paper, etc., had been duly stamped before the instrument was engrossed thereon; and in applying this enactment the rules appear to be:—

1. That the retroactive operation of the stamp is clear and complete, if the deed is not one of those expressly, or by lapse of the time allowed, excepted from the power of after-stamping, and, supposing the deed to be founded on in a process, if the proper stamp is affixed before any interlo-

¹ 19 & 20 Vict. c. 81, s. 3.

² 7 & 8 Vict. c. 21, s. 7.

³ *Beattie*, 28th April 1850, Sh. Justiciary cases, 356.

⁴ *Erskine*, 16th July 1819, *Murray's*

Jury Court Reports, ii. 182; *Matheson*, 27th March 1849, 6 *Bell's App.* 374; and *Bannatyne*, 13th December 1855, 18 *D.* 230.

⁵ *Pilling*, 30th Jan. 1857, 19 *D.* 938.

cutor is pronounced.¹ Even in a competition for the trusteeship in a sequestration (which is a continuous process), the Court have allowed a vote, founded on an unstamped document of debt, to be made good by the subsequent stamping of the document, such stamping being prior to the confirmation of the trustee.²

2. If the objection, founded on the want of the proper stamp, be stated before interlocutor, and the interlocutor, on the strength of the unstamped deed, is pronounced notwithstanding, the interlocutor will be reducible.³

3. If the proper stamp is not impressed in due time, the delay may throw the burden of expenses on the party.⁴

The question, Who is liable to pay for getting a deed duly stamped? is one of some importance. In the case of a mutual contract, the expense will fall upon the parties equally.⁵ In the ordinary case of a unilateral deed, the party holding the deed must make good his own title; and if a deed, which forms part thereof, requires to be stamped, he must bear the necessary expense.⁶ But a party prosecuted under his own unstamped obligation is liable in the expense of stamping, including the penalty, because he ought to have given a valid obligation at the first.⁷

Lastly, on this branch of the subject, the want of the stamp only affects the validity or operation of the particular instrument itself. It does not affect the right to the debt contained therein, or any separate mode of proof. But Professor Menzies⁸ notices that, in the case of an unstamped deed being lost, a serious risk will arise, inasmuch as the tenor of it cannot be proved. This, he says, 'has been found in England, and, although the point has not been tried in our Courts, it appears to be certain, upon principle, that a judge could not receive evidence of the tenor or contents of a deed, open to an exception which would prevent his looking at the deed itself, if produced.'

I have only to add, that besides having the Stamp Acts at present in force at hand for reference, in regard to the stamps to be made use of in current practice, it is necessary likewise to have access to the older Statutes in examining existing deeds, and to see that such deeds are engrossed on the proper stamps, if any were required at their dates respectively. But I do not think it necessary to refer to the particular provisions of these older Acts further than has already been done.

¹ Wright, 29th June 1821, 1 Sh. 93; Wood, 13th Nov. 1838, 1 D. 14; and Davidson, same date, 1 D. 10.

² Mories, 24th Nov. 1843, 6 D. 97; King, before cited.

³ See Lord Brougham's opinion in affirming the case of Robb, 9th July 1830, 8 Sh. 1035; affirmed 3d Oct. 1831, 5 Wil. & Sh. 740.

⁴ Ross, 18th January 34, 12 Sh. 308.

⁵ Smail, 16th July 1847, 9 D. 1502; Logan, 6th March 1850, 12 D. 841.

⁶ Munro, 18th Dec. 1830, 9 Sh. 225; Macpherson, 7th Feb. 1855, 17 D. 358.

⁷ Gardiner's Executrix, 28th Nov. 1839, 2 D. 155; Cheyne, 20th June 1863, 1 Macph. 960.

⁸ Menzies, p. 96.

TITLE IX.

THE CLAUSES COMMON TO MOST DEEDS, AND RULES AS TO THE EFFECT OF BLANKS IN WRITS.

CHAPTER I.

WE have now to consider the clauses common to, and usually framed on similar principles in, most deeds.

The first of these is technically called the Narrative.

NARRATIVE.

The narrative, or introductory clause, of a deed usually contains,—

(1.) The name and designation or description of the granter of the deed ;
(2.) The consideration or cause of granting ; and (3.) The name and designation or description of the immediate grantee. The place of abode, as well as the designation of the granter, requires to be stated, in deeds of consent under the Entail Amendment Act of 1848,¹ and relative Act of Sederunt, 18th November 1848. In other cases (not being those of bills and promissory-notes, in which the party's designation seldom appears), though it is not equally essential to describe the granter in the deed, the only correct practice is to do so, and the description should be such as clearly to identify the party, and to distinguish him from all others. This, as in the case of the witnesses, is best done by specifying his full Christian name and surname, occupation, and residence ; but there is this material distinction between the two cases, that the designation of the witnesses in the deed is a statutory solemnity, which cannot be supplied by condescendence or proof apart ; the designation of the granter may be so ; or may be arrived at by implication,—except in deeds of consent under the Entail Amendment Act. Thus, where a bond was granted simply by 'Alexr. Murray,' the holder was obliged to prove that the person of that name from whom he claimed payment was the subscriber.² And, in various cases of imperfect, or even to a certain extent incorrect, names or designations, the rule has been acted on that it is sufficient '*dummodo constet de personâ*,'—which, you will recollect, is the rule in reference to the writer of the deed and witnesses.³ Guthrie's case was that of a messenger-at-arms, named in a

DESIGNATION OF GRANTEE.

¹ 11 & 12 Vict. c. 36.

² Milne, 15th Feb. 1665, M. 11,657.

³ Scottish Union Insurance Company,

8th March 1836, 14 Sh. 667 ; see also

Guthrie, 27th February 1833, 11 Sh.

465.

summons raised against him 'William Munro;' whereas his full name was 'William John Munro.' The defective naming was held in the circumstances immaterial; but the case bears on a point of very considerable importance to professional men; I mean the subscription of their own names. It was successfully pleaded, in the above case, that the objection of misnomer could not be taken by Munro, because from his mode of subscribing his name, as appearing on the document which formed the ground of action, it was impossible to imagine that the letter 'J.' was interposed between 'William' and 'Munro.' On this point Lord Glenlee said, 'In the present case, the defender' (Munro) 'appears to have misled the pursuer by his signature, which, to any ordinary reading, is just "William Munro."' Lord Justice Clerk Boyle.—'I take much the same view. If he had signed "William John" in full, it would have required more consideration; but there is merely William with a flourish, which I never could take for the letter 'J,' and, if I had got a letter signed this way, I would have addressed the answer to 'William Munro.' The point, moreover, is especially noticed in the interlocutor of Court, which proceeds, *inter alia*, 'in respect that it appears from the writing referred to and produced, that the manner in which the name subscribed thereto is written might reasonably lead the pursuer to believe that his name was simply "William Munro,"' etc. This case has been the more fully quoted, in order to illustrate the importance of a signature so plain and legible as not to be mistaken. The object of the subscription being to indicate the name of the party, it is a great error either to be careless on this point, or to cultivate singularity of subscription.

In some classes of deeds the introductory clause does not name and design the granter. These are deeds by a number of parties whose names cannot be given, or, it may be, are not known at the time the deed is engrossed for signature; for example, deeds of accession by creditors or their mandatories to trust-deeds by debtors for their behoof; deeds of constitution of joint-stock companies; composition-contracts in sequestrations, or the like. It is usual in such deeds, where the same character belongs to all the subscribers, to express that character in this clause; as, for example, 'We, the subscribers, creditors, or mandatories for creditors, of A. B., etc., in debts entitled to the benefit of the trust, created by the trust-disposition after narrated,' etc. The full names and designations are inserted, in these cases, in the testing clause. When the deed is granted by tutors, factors, trustees, or others, acting under special powers, the narrative or introductory clause will set forth the character of the granters, and will also set forth, or duly refer to, the deeds and powers under which they act, as well as the granters' own names and designations.

With the exception of notaries, no person in Scotland requires to obtain judicial authority for the alteration of his surname.¹ In Kinloch's

CHANGE OF
SURNAME.

¹ Young, 14th January 1835, 13 Sh. 262; Kinloch, 13th Dec. 1853, 16 D. 197.

case, Lord Cowan, whose judgment, as Ordinary, was acquiesced in, says, 'The true principle is, that a person may sue, or be sued, under the name by which he is at the time called and known; which he uses in his contracts and transactions with the public, and by means of which, as a sufficient designation of him, his identity is rendered indisputable.' The establishment of the party's identity is the great essential.

CONSIDERATION
OF A DEED.

The consideration, or cause of granting a deed, is usually specified in this clause. In reading the cases before referred to, under the head of 'error' and 'misrepresentation,'¹ you cannot fail to see the essential value of strict and sometimes minute accuracy in the construction or preparation of the inductive or narrative clause; but, having examined these cases so lately, it is not necessary to enter upon any details regarding them again at this place. The provisions of the Stamp Act of 1808, as to the statement of the consideration or cause of granting 'conveyances' of the description there specified, and which statement is usually made in the narrative or introductory clause, have already been stated or referred to. Where that Act does not apply, the statement may or may not be expressed, without involving liability to penalties; but when the nature of the warrandice granted is not expressed, and is left to implication, it is important to state the consideration, because liability in warrandice will be absolute, or from fact and deed only, according as the deed is granted for onerous causes, or gratuitously; and no question on that point ought to occur through defect or omission in the preparation of the deed. The cause of granting ought to be expressed as briefly as possible; but always so as to account for the act done, or the agreement entered into, by the deed, and likewise to prepare for any burdens or conditions created by the deed. One or two examples will explain what should be its general nature. In a disposition of lands, sold by private bargain, the deed will simply narrate the payment of the agreed-on price. When the lands are sold under powers in a bond and disposition in security, with reference to which, notice, and requisition of payment, advertisement of the intended sale, and public roup, have been required, the deed will recite the power of sale, the notices and requisitions, advertisements, roup, and purchase, as well as the payment of the price. If the deed is a conveyance by trustees to the residuary legatee under a trust-deed, of the reversion of the trust-estate, the narrative will express the purposes of the trust, and the performance of the primary purposes, whereby it has become incumbent on the trustees to denude of the residue, in fulfilment of the ultimate purpose, and for winding up the trust. And if all the purposes are not completely fulfilled,—for instance, if some annuity is still subsisting, or a legacy unpaid, and if the conveyance is to declare the annuity or legacy a real burden on the reversion of the estate,—the narrative will express that such is the arrangement.

¹ See particularly Ewen, as reversed, 4 Purdom, 19 D. 206; and Falconer, 1 Wil. & Sh. 346; Dickson, 16 D. 586; Macph. 704.

CHAPTER II.

WARRANTICE is the obligation of the granter of any conveyance, or WARRANTICE.
 other deed, that the same and the right thereby granted shall be good and effectual to the grantee; implying, or expressing, that—in case of reduction of the deed, or of eviction of the subject contained in it, in whole or in part, on account of any fact or deed of the granter, or of his predecessors, or any defect in the granter's title, or it may be on any ground not attributable to the grantee,—the granter shall make good the loss or damage thence arising to the grantee. The nature and extent of the warrantice granted is usually expressed in the deed, in connexion with which it arises; in which case, the obligation or clause of warrantice speaks for itself as to these points; but warrantice, when not expressed, will be implied, and its nature and extent will then depend on the nature of the relative transaction. The nature and extent of the obligation, in like manner, depends on the relative transaction, when the obligation is, generally, to warrant the deed or right,—except in the single case of the clause of warrantice in dispositions, in the form introduced by the Conveyancing Acts of 1847; which, though general in its terms, has, by these Acts, a specific meaning, when not qualified. But the ordinary warrantice applicable to any transaction can be expressly limited or qualified according to the direction of the parties.

Warrantice is either personal or real. Of the latter we shall treat, in connexion with the contract of excambion, being almost the only deed now in common use, with reference to which we meet with such warrantice. Personal warrantice, when expressed, may be varied in many PERSONAL
 ways; when implied, and generally when expressed, it is of three kinds:— WARRANTICE.

1. Against future voluntary acts and deeds of contravention, to be done by the granter.
2. Against all facts and deeds of contravention done, or to be done, by the granter, whether past or future; and
3. At all hands and against all mortals, or absolute; extending to every ground,—not attributable to the act or neglect of the grantee,—on which the deed or right granted can be impeached.

Warrantice can be so expressed as to exclude any claim founded on implied warrantice. Contracting parties can regulate such a matter according to their own absolute discretion.

Warrantice of the first class, that is, against future voluntary contraventions, is implied and usually expressed in donations, in which the granter gives, or is understood to give, just what he himself has. The deed here is said to be gratuitous as to the granter, and lucrative as to the grantee. Accordingly, such warrantice does not authorize recourse against past deeds of the donor, nor even against future deeds which the

donor was legally bound to grant. These are future in letter only.¹ A future voluntary deed, in contravention of a donation, amounts to a fraud, and clearly infers recourse.² But if donations are given with warrandice from facts and deeds past as well as future, or with absolute warrandice, the express obligation will receive effect according to its own terms.³ In Coventry's case, a father disposed lands to his younger son by a *mortis causâ* disposition, containing clause of absolute warrandice,—a degree of warrandice not usual in such deeds. Of the same date, the father disposed his whole other estate to his elder son, under burden of paying all debts due by him at the time of his death. A debt was subsequently contracted by the father, partly on the security of the lands conveyed to the younger son,—and for a portion of which the younger son would have been liable, if the disposition in his favour had contained no clause of warrandice; but the elder son was found liable to relieve the younger of the whole debt, under the clause of absolute warrandice contained in the disposition to the younger son. The cases noted suggest the necessity of caution in reference to the introduction of unusual clauses in testamentary deeds; and, specially, of taking care not to deal with the clause of warrandice as one of mere style. Moreover, when any one imposes the burden of a debt *in cumulo* on lands which he has disposed by *mortis causâ* deeds to two or more disponees, he ought always to make a codicil or addition to his *mortis causâ* dispositions, declaring in what proportions the *cumulo* debt is to affect the disponees and their lands respectively, or that his general estate is to bear the burden of the debt, if such be his intention.

WARRANTICE
IN ASSIGNA-
TIONS.
FROM FACT
AND DEED.

Warrandice of the second class, that is, from facts and deeds done or to be done, is implied, and usually is expressly granted, in ordinary assignations of debts. But, besides the warrandice so implied or expressed in such deeds, there is a further warrandice implied when any one grants an assignation to a debt, viz., that the debt is subsisting, and due by the alleged debtor to the cedent at the time of granting the assignation.⁴ The above warrandice, however, in the case of the assignation of a debt, does not infer any obligation on the granter that the debtor is solvent. All that is implied is the validity of the debt. In case of the debtor's insolvency, 'the assignee's loss arises, not from any defect in the debt assigned, but from the insolvency or disability of the debtor.' Neither does absolute warrandice, in the case of the assignation of a debt or sum assigned, nor warrandice 'that the same shall be effectual,' import the solvency of the debtor.⁵ Such warrandice merely imports '*debitum subesse*;' that the deed assigned cannot be reduced, and that the cedent, and no other, has right to it.

Erskine says,⁶ that warrandice from facts and deeds done or to be

¹ Erskine, ii. 3. 25.

² Alexander, 15th July 1675, M. 940.

³ Coventry, 8th July 1834, 12 Sh. 895;
and Strong, 29th January 1851, 13 D.

548.

⁴ Ferrier, 16th May 1828, 6 Sh. 818;
Sinclair, 12th Feb. 1829, 7 Sh. 401.

⁵ Barclay, 24th Nov. and 12th Dec. 1671,
M. 16,591, 16,594.

⁶ Erskine, ii. 3. 25.

done is usually granted, when a right with doubtful title, or of doubtful value, is conveyed by transaction for a compounded sum, or where the cause of granting, though onerous, is not adequate to the value of the subject; in which cases, such warrantice is implied though not expressed. In such cases, I think the usual course is either to stipulate that no warrantice is granted, or to limit the warrantice to the sum paid for the conveyance; where a debt is assigned, unless the obligation of warrantice be limited, the cedent's liability, in case of eviction by any one having a preferable title, will extend to the full amount of the debt.¹

In the case of the conveyance of lands, an obligation of warrantice from the disponent's facts and deeds *allenary* is contrary to what is usual. It seems to imply a special agreement; and upon eviction, in respect of a fact or deed, not of the disponent, no claim of recourse arises against the disponent.²

Absolute warrantice is implied, and usually is expressed, in dispositions of lands, for an onerous cause; also in leases, and various other writs. ABSOLUTE
WARRANTICE.

The clause, 'I grant warrantice,' in dispositions of lands, in the form introduced by the Conveyancing Acts of 1847,³ imports, as provided by these Acts, unless specially qualified, absolute warrantice as regards the lands and writs thereof, and warrantice from facts and deeds, as regards the rents.

It has been said that no warrantice is implied against mere *consenters* to a disposition, whose concurrence simply imports the conveyance of all their right and claim, *tantum et tale*; or an obligation not to use any right they have in opposition to the right of the disponent; but I think consenters will in some cases be liable in simple warrantice, that is, not to grant any future right, founded on the title which they had when consenting, and in contravention of what is implied in their consent. CONSENSERS.

The purchaser, however, takes his lands subject to the risk of losses or burdens falling thereon after the date of the purchase, and which had no cause anterior to it; for example, by fatality. The rule here is, *res perit domino*. Loss may arise also by a public Statute passed after the sale, imposing a new burden, or introducing a new ground of eviction.⁴ Such loss infers no contravention of the seller's warrantice. But the result appears to be different, if eviction arise under a public law, existing prior to the sale; at least where the warrantice was contained in a conveyance of church lands, out of which a glebe was subsequently designed.⁵

In case of eviction, the obligation of warrantice, if subject to no limitation, express or implied, founds the grantee in an action of recourse against the granter for the full damage he sustains, as at the date of the EFFECT OF
WARRANTICE

¹ Erskine, ii. 3. 30.

² Craig, Jan. 1732, M. 16,623; Ogilvie, 2d Feb. 1715, M. 4154.

³ 10 & 11 Vict. c. 48, s. 3, and 10 & 11 Vict. c. 49, s. 2.

⁴ Watson, 15th July 1667, M. 16,588

⁵ Elphinstone, July 1663, M. 16,585;

Bonar, 20th Feb. 1683, M. 16,606.

eviction.¹ When a lease is evicted, the claim extends to the estimated loss or damages to arise to the tenant during the whole term of the lease.² In Middleton's case, it was found, *inter alia*, that absolute warrandice is implied in a lease, when no warrandice is expressed.

The operation of the obligation of absolute warrandice is strongly exhibited in the following case.³ Lands and teinds were sold to A. B. with absolute warrandice. The teinds had been purchased by the seller's predecessor from the Crown, and a decret of sale had been pronounced, but the price had not been paid. It formed a burden upon the teinds. The Crown claimed and obtained payment of the price of the teinds from A. B., and, though the seller to him of the lands and teinds was not a party to the decret of sale, and so not directly bound thereby, he was held liable to relieve A. B. of the price of the teinds, as being a burden upon the subject which he had sold with absolute warrandice. Lord Justice-Clerk Hope observed, 'It is sufficient eviction that the pursuers have been called upon to pay the price of their teinds.' And perhaps still more strongly in another case,⁴ where a party sold a house, having previously granted a heritable bond over it. The purchaser, who knew nothing of the heritable bond, and paid a full price for the house, did not take infestment on the disposition in his favour, and, by-and-bye, resold the house with absolute warrandice. Before the new purchaser took infestment, the heritable creditor infest himself under his bond, and, being first on the record, he recovered his debt out of the subjects. The intermediate proprietor, though he was not personally liable under the bond which had been granted by his predecessor, was found liable, under the absolute warrandice granted in his disposition, to relieve his disponent of the debt.

WARRANDICE
IS *stricti juris*.

Warrandice is *stricti juris*, and consequently contravention is not easily presumed; nor is the obligation to warrant extended beyond its strict letter.⁵ The obligation does not authorize the purchaser of lands, affected by servitudes of a common and ordinary description, to make any claim on the seller, when such servitudes are light.⁶ But this is a question of degree; the servitude, though common, may be so heavy as undoubtedly to authorize a claim; and when servitudes exist, and the purchaser is to take under the burden of them, the deed should expressly say so. The grant by a tenant to a neighbouring proprietor, of liberty to carry off all the spring-water on his farm to a bleachfield, containing no express clause of warrandice, and subsisting only during the grantor's lease, was held not to make the grantor responsible for the interruption of the grantee's operations by a third party, of whose right to interrupt them both parties were presumed to be aware at the date of the grant.⁷ These

¹ Stair, ii. 3. 46; Erskine, ii. 3. 30;
Carmichael, 22d May 1821, 1 Sh. 25.

² Middleton, 27th November 1828, 7
Sh. 76.

³ Briggs' Trustees, 12th Dec. 1851, 14
D. 173.

⁴ Dewar, July 1780, M. 16,637.

⁵ Erskine, ii. 3. 31; Ogilvie, 2d Feb.
1715, M. 4154.

⁶ Sandilands, 21st June 1672, M. 16,599;
Symington, 14th Jan. 1780, M. 16,637.

⁷ Reid, 21st Feb. 1822, 1 Sh. 334.

cases show the importance of making inquiry, and giving full information, as to servitudes, or burdens of the like nature, on lands about to be sold, and specifying these distinctly in the particulars furnished to intending offerers, and also in the missives of sale; and, in such cases as Reid's, of making an express provision that no warrantice is granted. It will at once occur to any one, reading the report of that case, that it was a great hardship on Reid to be dragged into Court to protect himself against an action of damages where he had so small an interest.

It has been found that the obligation of absolute warrantice does not authorize a purchaser to claim the discharge of an old right of real warrantice, on which no action was threatened.¹ It is not, however, to be assumed that a modern right of that nature would not authorize a claim on the part of the purchaser of the lands thereby affected. What the claim of the purchaser would be, would depend on the circumstances of each case. But probably the mere existence of the obligation of real warrantice would not authorize the purchaser to make any claim in the case of an excambion, or exchange of lands for lands, because in such case the liability to real warrantice is mutual, and, in case of eviction of the lands given on the one side, there would be immediate recourse upon those given on the other, even if held by singular successors.

The question naturally occurs, At what time does the claim, arising upon the obligation of warrantice, come into operation? When the threatened eviction arises upon the deed of the immediate author, that is, if such author has granted double conveyances, or double rights, in favour of different parties, of or affecting the same subject, instant action of recourse will be sustained against him without waiting till the property acquired from him is evicted or carried off.² But, if the eviction is founded on a right said to be preferable to that of the granter of an obligation of absolute warrantice, no claim against the granter will arise, on his obligation of warrantice, until actual eviction takes place. And, supposing the defence against the threatened eviction to be successful, the obligation of warrantice does not, unless so expressed, give any claim to the expense of the defence. The obligation is, not to defend against claims and actions, but to make good loss, in case of eviction.³ The threatened eviction ought, however, to be intimated to the party who will be liable in case it is successful;⁴ and an action of recourse can be brought, as soon as eviction is threatened, if the liability of the party, against whom the claim of recourse lies, is disputed. In such circumstances, it is not necessary to delay having the right of recourse tried till after eviction.⁵

It will be observed that the party against whom eviction is threatened has, in some views, a better claim if he is unsuccessful, than if he

¹ Durham's Trustees, 9th July 1800, M. 16,641.

² Smith, 17th February 1672, M. 16,596.

³ Stair, ii. 3. 46; Inglis, 26th Feb. 1771, M. 16,633.

⁴ Erskine, ii. 3. 32.

⁵ Melville, 14th Jan. 1842, 4 D. 385.

prevails, because, if unsuccessful in defending the subject, he will get his expenses, besides the value of the subject evicted, from the granter of the obligation of absolute warrandice; whereas, if successful, he indeed preserves to himself the subject, but does not get his expenses. We cannot, therefore, be assured of the same hearty defence against the action for eviction, as if his interest in the successful result were clear and undoubted. No doubt he cannot, with impunity, throw away the case; and, to a certain extent, he is clearly liable for his omissions. For example, he may offer an irrelevant defence, or subject himself to an incompetent mean of proof.¹ But, apart from such cases, there is a material difference between the defence of one really and ultimately liable, and of one not fully interested. It may, therefore, sometimes be a measure of prudence, on the part of the granter of the obligation of warrandice, to take the defence into his own hands, and to make an arrangement with the grantee on the subject of the expense.

**SALE OF GOODS,
ETC.**

Formerly, absolute warrandice was implied on the sale of goods, but by the Mercantile Law Amendment Act of 1856,² the seller is not held bound in warranty of their quality or sufficiency, if he was ignorant of defects at the time of the sale, unless he shall expressly bind himself, or unless he shall have sold them for a specified and particular purpose, in which case he shall be considered, without any express warranty, to warrant that they are fit for such purpose. On a similar principle, it appears to be the law, that, when one lets a house to be employed for a particular use or manufacture, he warrants that it shall be suitable for the same.³ And where a horse was sold as quiet to ride and steady in harness, which, on trial, it was found not to be, the purchaser, who acted with great promptitude and decision, was found entitled to return the horse.⁴ It is not necessary that the express words, 'I warrant,' or any similar words, should be used, in order to found the claim of the purchaser in such cases. In the case of leases of unproved mineral fields, with the view of avoiding such a claim as here pointed at, it is not unusual to qualify the clause of warrandice with a provision that the existence of the minerals intended to be let, and the success of the tenant's operations, are not warranted; but that the tenant takes the risk in these particulars upon himself. In other words, the lease in such case is a speculation, of which the profit or the loss will be the tenant's.

**MINERAL
LEASES.**

¹ Clerk, 23d June 1681, M. 16,605.

² 19 & 20 Vict. c. 60, s. 5.

³ Murray, 19th Jan. 1776, M. 16,636.

⁴ Scott, 9th Dec. 1857, 20 D. 253.

CHAPTER III.

THE next clause common to most deeds is the consent to registration of the deed in the books of a Court of Justice, with a view to preservation or execution, with which there used to be conjoined a relative procuratory or warrant for accomplishing such registration. The procuratory is now no longer necessary, as will be afterwards explained.

REGISTRATION
FOR PRESERVA-
TION AND EXECUTION.

The two purposes of the registration of deeds in general are preservation and execution. Conveyances of all kinds, and some other deeds, can now be registered in the Register of Sasines for publication. But registration for preservation or execution, and registration for publication, have no manner of connexion with each other. Their objects are essentially separate and distinct; and at present I am to deal only with registration for preservation or execution, reserving until a future stage of the course registration for publication.

Registration for execution is clearly incident to the establishment of our Courts of Justice; registration for preservation only, and for publication—the creature of Statute alone. Preservation is now more usually the occasion of registration than execution, and the benefits we derive from the registers, as affording safe custody to principal deeds, are well known. But it is clear that execution was the earlier object of registration with us. And, in arriving at a right understanding of the consent to registration, it is necessary in the first place to consider it as relative to the purpose of *execution*. In doing so, it is important to read the clause, as given by Dallas, in the form of personal bond with which his Style Book commences. That clause runs thus: ‘And, for the more security, we are content, and consent, thir presents be insert and registrat in the Books of Council and Session, or others competent, to have the strength of a decreet of the Lords or Judges thereof interponed thereto, that letters of horning on six days, and others necessar, in form as effeirs, may be direct hereupon; and to that effect constitutes our procurators, etc.’

EXECUTION.

This clause consists of five parts, viz. :—

1. The consent of the granter to registration of the deed in the books of a Court of Justice.
2. The object of the registration, viz., in order to have the strength of a decreet of the Judges interponed thereto.
3. The use to which the decreet is to be put when obtained, viz., for the purpose of diligence or execution against the person and estate of the party.
4. The appointment of procurators to represent the granter in Court, and move for decreet to the above effect.
5. The words with which the clause commences, ‘and for the more security,’ will likewise authorize a few remarks.

The object and practical value of the consent to registration in order

REGISTRATION
FOR EXECUTION.

to execution is well illustrated by looking to the position of a party who wishes to make an ordinary claim of debt, a sum due to him on open account, for example, effectual by execution. Such party has to raise a summons against the debtor, and to appear in Court by his counsel or agent; the debtor, it may be, appearing in like manner. If the claim is proved, the Court pronounces judgment or decreet, ordaining the debtor to pay or fulfil, as the case may be. The decreet thus obtained is inserted or registered in the books of the Court, and an official copy or extract from these books, authenticated by the Clerk of Court, is given out, which becomes the direct warrant for execution against the debtor's person and estate for compelling him to satisfy the claim. The same results will follow if, when the case comes into Court, the debtor, in place of endeavouring to resist, shall admit or confess the claim. In that event, judgment will be pronounced against him upon his own admission or express consent. Where a party is claiming the sum or balance arising on an open account, or where there are not probative documents at hand which at once verify his claim, there is clearly necessity for judicial proceedings of the above nature, which may be more or less tedious and expensive. But when there is a probative writing instructing the debt, though parties could never give authority to one another to take measures at their own hand of the nature of legal diligence or execution, it is no stretch of principle, and is but a short step beyond the admission in a formal process, to incorporate with the writing by which the debt is instructed a consent that judgment or decreet shall be obtained in a short and simple form against the granter, authorizing summarily that execution which would follow upon a decree obtained in the ordinary but more tardy way.

Hence, I think, has arisen the introduction, into bonds and other deeds, of the consent to registration in the books of a Court of Justice, in order to decree for execution, and the appointment of a procurator for accomplishing the registration agreeably to the forms of Court. Hence, also, it appears that registration for execution is incident to the establishment of our Courts of Law, and is not a separate institution. The proceeding authorized by the consent and procuratory for registration is, in fact, a regular, though summary, process before the Court. It assumes that, at the request of the grantee or holder of the deed, but in the name of the granter, and as authorized by his consent, and specially appointed by his procuratory, a counsel or agent duly qualified appears in Court, producing the document of debt or claim, and moves the Judge to insert or register the document in the books of the Court, and to interpose his decreet in conformity with the consent or clause of registration therein expressed. The Judge ordains the deed to be registered accordingly, gives the same the strength of his decreet, and authorizes legal execution in terms of the consent. The principal document, produced as above, is the warrant of the decreet; and, as such, is retained by the Clerk of Court for the same reason that he retains the warrants of ordinary decreets. The decreet of

Court, which embodies a verbatim copy of the document, goes into special books kept by the Court for entering such decreets. And, as matter of course, an official copy, or extract of the decret containing a full copy of the document or warrant is, at the request of any party, given out under the hand of the Clerk of Court, or other party authorized to authenticate the same. The extract-decret so obtained, or, as we now understand it, the extract of the document founded on, is equally probative in Scotland with the principal, in every particular,—except when the principal is challenged, as false and forged; and the extract likewise, as a decret of Court, forms the direct authority for legal execution, in terms of the consent contained in the principal deed. There is abundant evidence in books of authority and reported decisions in support of these views.

After the abolition of the old Church Courts, which took place at the time of the Reformation in Scotland, it was found necessary to institute a Commissary Court, to take cognizance of a particular class of causes; and in Balfour's Practicks,¹ there is given a copy of the instructions issued in 1563 by the Queen to the Commissaries of Edinburgh. In article 13th of these, power is given to the Commissaries to registrate contracts, etc., providing the same should bear consent to registration; 'and that na contract,' etc., be 'ressavit or registrat without the Judge be present to heir the samin red, and interpone his autoritie thairto, and know the parties contracteris. Except it be in licht causis,' in which it should be 'leasum to the clerk him alane to ressave the samin.' Registration, you will observe, is here dealt with as a judicial act and process.

The Act 1584, cap. 4, quoted in connexion with the history of the forms of authenticating deeds, speaks of the consent to registration as 'ane greater solemne act nor sealing.' This obviously referred to the production and acknowledgment of the writ in Court by the granter's counsel or procurator, in presence of the Judge. But such production, viewed as a mere nominal proceeding, could be of little force in the way of authentication; in such view, it could not be spoken of as a solemn act at all. It is therefore necessary, in order to give meaning to the Statute, to conclude that, at the period in question, the Act of Registration was a judicial process, and no mere matter of course. And Sir Thomas Craig,² speaking of various modes of authenticating private deeds, so as to exclude forgery, says, 'With us, at the present day, registrations, which ought to take place in Court only, are allowed wherever the registrar himself, or his deputy, happens to be present.' Here he expresses the principle, that registrations ought to take place judicially, and not otherwise; and seems to complain that the practice of his day allowed a certain degree of latitude in that respect. Mr. Ross,³ referring to the Queen's instructions to the Commissaries, and the above Act of Parliament, considers the old practice of making registration a judicial act as clearly established; and the form in which extracts of bonds and other ordinary writings are issued, and, still more, the forms in which

¹ Balfour's Practicks, p. 655.

² Craig, p. 240.

³ Ross's Lectures, i. 109.

more anciently they were issued from the Books of Council and Session, demonstrate that, upon registration, the Court have all along pronounced a decret, very much as in an ordinary undefended action.

Thus the extract of a personal bond by George Dundas and Thomas Hamilton to Elizabeth, Janet, and Jean Wauches, dated 27th and 28th May 1639, and registered in the Books of Council and Session 4th December 1665, commences thus: 'At Edinburgh, the 4th day of December 1665 years,—In presence of the Lords of Council and Session,—Compeared Mr. John Rollo, advocate, pror. speciallie constitute be the band underwritten for Thomas Hamiltone under dessint' (not for George Dundas, you will observe, and I will afterwards explain why the appearance was for Hamilton only), 'and gave in the samen, sub^t with his hand, desyring the samyn to be insert and reg^{mt} in the Books of Council and Session to have the strength of ane decret of the Lords yrof: That lres. and exells.¹ necessary, may be direct thereon, in manner therein speit: Whilk desyre the said Lords fand reasonable, and thairfore, hes ordained and ordaines the said band to be insert and reg^{mt} in yr. saids books: Decernes the same to have the strength of their decret, and ordaines lres. and exells. necessar, to be direct thereon, in mauner therein speit: Whereof the tenor follows.' Then there is copied the full bond, including the subscriptions of parties and witnesses,—and the writing concludes thus: '*Extractum de libro actorum per me.*' (Signed) 'A. Primrose, Cl. Reg.' The title, written on the back of the extract, is also instructive. The extract is indorsed, not as would be done now, 'Ext. Reg^d Bond, by George Dundas and Thomas Hamilton, to Misses Wauches.' The indorsation is 'Reg^{mt} Bond, Wauchs *contra* Hamilton,'—exactly like a decret in favour of the holders, against the granter of the bond. This document confirms and illustrates what has been stated with reference to the principles of the system of registration in virtue of a consent. It further bears, that the motion made to the Court for decret was signed by Mr. John Rollo, advocate, as the procurator for the granter or consenting party; and on the principal bond, which may be seen at the Register House, there is written 'I, Mr. John Rollo, advocate, consent for Thomas Hamilton within designed to the registration hereof,' etc. This is not signed; but there can be little doubt that consents, in the above words, were, in earlier practice, actually signed by the counsel or agent.

The necessity of the consent to registration for execution is further shown by a case,² where, on an application for registration of a bond, which contained only the procuratory for registration (without the consent to decret for execution), the Court found that the same could only be registered in order to 'conservation,' and not in order to diligence. There was no consent to decret, but simply a warrant to register.

PRESERVATION.

Hitherto we have been considering the subject of registration as connected with its first object, viz., execution; and, perhaps, you may have remarked that, in Dallas's form, the purpose of preservation, now so

¹ 'Letters and executorials.'

² Erskine, 27th July 1710, M. 14,997.

prominent in the modern clause, does not occur at all, but only that of execution. But the benefits of registration, for the purpose of preservation, came to be developed, as was natural. Even in the most peaceful times, the preservation of principal writs of essential value is matter of anxiety. It is clearly expedient to place every valuable deed on the register for preservation; but the times we have been speaking of were full of commotions, and the value of a public trustworthy place of deposit was very great. The system also presented greater inducements than a mere place of deposit for the principal deed; the deed, when registered, was entered in the Court books kept for the purpose; an official copy or extract from these books was given out to the party registering, and the law of Scotland allowing equal faith to the extract as to the principal deed (except when forgery is alleged), such party had, in the extract, everything useful which was in the principal. He had thus the full benefit arising from the safe custody of his principal deed, without any inconvenience from want of access to the deed; and in case of the loss of the original official copy or extract, he could, at small cost, get one or more renewals at any time as required. Such at least was the case in regard to the register of the Books of Council and Session. There is no doubt that some of the provincial registers were not so well kept, nor were the deeds there deposited carefully preserved. Preservation, however, came to be largely if not mainly the object of the registration of deeds; and, with reference to that object, the forms of procedure applicable to a process with parties, procurator, and judge, all present in Court, were obviously cumbrous and unnecessary. Gradually, therefore, these forms were dispensed with.

This is shown very distinctly by the Act of Sederunt of 9th December 1670, which contains warrant to registrar bonds, contracts, and other writs, and therein to insert the consent of advocates or procurators to the registration, as they were in use to do formerly, and to give out extracts thereof, notwithstanding that the advocates do not subscribe their consent.

The consent of advocates, as procurators, to the registration of deeds for execution, thus appears to have been required, after the form of appearing in presence of the Judges had been dispensed with,—a state of the practice which is further instructed by the case of Channell,¹ where registration of a deed, after the death of the grantee, was found informal, because registration was a decree of consent, requiring *actor* and *reus*, or pursuer and defender; and, the pursuer being dead, there could be no registration at his instance. The only remedy in such case, for enforcing implement of the deed, was an ordinary action founded on the deed.²

With a view to mere preservation, the principle of process and decret thus threatened to be an obstruction. But the benefits of registration had been too long experienced to allow of their being so inter-

¹ Channell, 16th Feb. 1693, M. 839.

² Shanks, 15th Jan. 1635, M. 14,993; Brown, 12th Feb. 1635, M. 14,994.

1693, c. 15.

rupted. We, not many years ago, saw a decision of the Court, calculated to create anxiety as to the security of title-deeds in general, immediately followed by an Act of Parliament, which removed the grounds of apprehension, viz., the Act rendering pagination of deeds unnecessary as a solemnity; and we see this case of Channell, after exposing an imperfection in the system of registration, immediately followed by the Act 1693, cap. 15, authorizing all writs registrable to be registrable after the death of the creditor, at the instance of his heir, executor, or assignee, as well as before, and with the same effect, both as to probation and diligence; requiring, however, the production of a title in the person of his heir or assignee. The principle of dealing with registration as a proper judicial proceeding was thus still preserved; the party suing out the decree of registration being required by the Act to produce a title before he could obtain his decree, just as in an ordinary judicial process.

1696, c. 39.

There was still a possible difficulty to be obviated, however, viz., the contingency of the death of the grantor or obligant, before registration of his deed; and the Act 1696, cap. 39, made the necessary provision on that point, declaring that all bonds, and other writs registrable, might be registrable after the grantor's death, in the same manner as if they were registrable before his death.

When quoting from the extract of the bond granted by George Dundas and Thomas Hamilton to Misses Wauchs, which was registered in 1665, prior to the passing of the above Act, I noticed that the same was registered on the motion of a procurator, acting in name of Hamilton only, and the extract was indorsed—'Wauchs *contra* Hamilton.' This was because Dundas had died several years before the registration took place. This Act of 1696, however, removed the last of the old necessary formalities essential in principle to registration, viewed as a process. The production of a title in the person of an heir or assignee, applying for registration after the grantor's death, as required by the Act of 1693, would no doubt have been an inconvenience, had it been insisted on; but we are told by Mr. Ross¹ that the Clerks of Court did not long require such title; they registered the writ on presentment; leaving the heir, or other party having a right to it, to produce his title when suing out diligence or other proceedings upon the decree of registration. Accordingly, we find that writs, when registered after the death of the granters, express the appearance of procurators for them, though they are dead, and that, so far as the registration is concerned, the proceeding goes on, after the death of both grantees and granters, just as if they were still alive.

MODERN FORM
OF EXTRACT.

The extract of a registered deed now runs thus: 'At Edinburgh, the day of 186,—In presence of the Lords of Council and Session,—compeared A. B., Esq., Advocate, procurator for 'C. D., after designed, and gave in the bond underwritten, desiring the 'same might be registered in their Lordships' Court Books, conform to

¹ Ross, i. 118.

'law ; which desire the said Lords found reasonable, and ordained the 'same to be done accordingly ; whereof the tenor follows.' Here the deed is engrossed *ad longum* ; and the extract closes thus : 'Extracted furth 'of the Books of Council and Session upon these' (so many) 'pages by 'A. B., Keeper of the Register of Deeds, Probative Writs, etc., conform 'to Act of Parliament, and holding commission to that effect from the 'Lord Clerk-Register.' And it is authenticated, as we shall afterwards explain. The principle of process and decree is thus kept up, though the words of the decree are less full and particular than in the older form before quoted.

The proceedings already explained are those applicable to the registration of writs which contain consent to decree for execution, and procuratory for registration ; but there was an important class which had no such clause, and to which it was thought desirable, for commercial purposes, that the privileges of summary execution should be extended, viz., bills of exchange. This was accomplished by the Acts 1681, c. 20, & 1696, c. 36, declaring the instruments of protest of such bills registrable within six months after the date of the bill in cases of non-acceptance, and six months after its maturity in cases of non-payment, in the Books of Council and Session, or other competent judicatories, 'to 'the effect of having the authority of the Judges interponed thereto, in 'order to diligence, in the same manner as upon registered bonds or 'decreets of registration, proceeding upon consent of parties.' Similar privileges have been granted in reference to promissory-notes.¹

But, with the exception of bills, no document could, until the year 1698, be registered for preservation or execution, unless it contained a clause consenting to such registration. And the convenience and value of registration, for the purpose of preservation, having become appreciated, the Act 1698, cap. 4, was passed, declaring it lawful to register for conservation, in any competent public authentic register, all probative writs, though wanting a clause of registration ; the principal to be given back to the party, and the extract to make entire faith, in the same manner as if the writs had been registered by virtue of a clause of registration, except in the case of improbations. This Act completed the machinery for registration with a view to preservation, making the same available as regards all probative writs, whether with clauses of registration or not.

The incidence of registration to every Court of Justice, though productive of so much benefit to this country generally, occasioned inconvenience in this respect, that it multiplied registers ; for, except as regarded charters by subject-superiors, which, by express Statute,² could be registered only in the Books of Council and Session ; and, in cases where the consent to register was limited to any particular Court, the registration might take place in any Court. The decret of registration had effect, of course, only within the jurisdiction of the Court which

¹ 12 Geo. III. c. 72, s. 36, made perpetual by 23 Geo. III. c. 18, s. 55.

² 1693, c. 35.

granted it; being, in that respect, on the same footing with any other decret, which is unavailing when the defender is not domiciled within the jurisdiction of the Court by which it is pronounced. But, besides that deeds might be registered in any one of so many Courts, the officials in the smaller Courts were not uniformly careful of writs committed to their charge; indeed they had not the means of preserving them. Consequently the writs in many cases were lost, or in danger; and their register-books were not in much better condition.

49 GEO. III.
c. 42.

These evils have been in some measure remedied by the Act 49 Geo. III. cap. 42, passed on 12th May 1809, which, upon a recital of the inconvenience arising by the multiplication of registers for execution and preservation, prohibits, from and after six months after the passing of the Act (12th Nov. 1809), all registration in Commissary Courts, and all registration in the Courts of royal burghs, or burghs of regality or barony, except that clerks of royal burghs may register protests on bills or notes, instruments of sasine, and some other writs which I will specify presently. Sect. 3 provides that, if after the date foresaid (that is, after six months from the date of the Act) any clerk of a royal burgh shall receive any writ (not being one of those allowed to be registered) for being recorded, or shall transcribe the same into their books, or shall give forth copies purporting to be extracts from these books, 'the said books, copies, and extracts shall not make faith, or be of any avail or authority whatever.' Practically, this is a very important provision. Where deeds not within the specified exceptions have been registered in prohibited books, and the extracts from such books have been made use of as warrants of sasine or diligence, etc., the extracts being in such cases improbable, the sasines, diligence, etc., appear to be inept, as proceeding without warrant. By Sects. 4, 5, 6, and for the convenience of the public, and better preservation of the registers, the Commissary clerks, and clerks of burghs of regality and barony, were appointed on or before the expiration of six months from the passing of the Act to deliver all the books, or registers of deeds, or of probative writs, kept by them or their predecessors, and which were then in their custody, with the minute-books and warrants, as follows:—the Commissary-Clerk of Edinburgh to the Lord Clerk-Register, to be deposited with the Public Records of Scotland; and the others to the Sheriff-Clerk, or Steward-Clerk of their county, to be deposited with the other Public Records under their care. And Sect. 16 provided that extracts of writs from the Great Seal Register (which contains all Crown charters) of which the fact and date of sealing shall have been duly recorded, shall make entire faith in all cases except improbation.

RECORDS IN
SCOTLAND.

The Records now available in Scotland for the registration of deeds, and instruments of protest on bills or notes, are,—

1. The Register of the Great Seal, for writs passing that seal.
2. The Books of the Court of Council and Session, for all deeds and probative writs.

3. The Books of every Sheriff or Steward Court throughout the kingdom, for all deeds and probative writs, except charters by subject-superiors, which can be registered in the Books of Council and Session only

4. The Books of Royal Burghs, for instruments of protest on bills or notes; deeds relating exclusively to subjects held by burgage tenure, and within burgh; or where all the parties are burgesses, or have a legal domicile within the burgh at the date of presentment for registration.

The Register of the Great Seal is available for preservation only; the other registers both for preservation and execution, or for either object in the case of writs containing clauses of consent to registration for such purposes; the execution on writs registered in the Sheriff or other inferior Courts being, as already observed, competent only within the Court's jurisdiction; and when there is no clause of registration (the deeds being probative), the registration is for preservation only. Deeds containing clauses of registration, however, being probative writs, may, in the option of the party registering, be competently registered as such.

The volumes in which the deeds are booked, and which form the registers, must be marked and issued by the Lord Clerk-Register, or his deputies. The Books of Council and Session are kept in the General Register House in Edinburgh, and are transferred to the Lord Clerk-Register for custody as they are completed. Those to the end of 1857, for example, were transmitted at the beginning of January 1859. The records in the Sheriff and Burgh Courts remain permanently in their respective localities, and are not transmissible to Edinburgh.

The extracts or official copies of deeds registered in the Sheriff and Burgh Courts are authenticated by the subscription of the Clerk of Court, or his deputy duly authorized. The extracts of those registered in the Great Seal Register are authenticated by the deputies of the Lord Clerk-Register; and the extracts of those in the Books of Council and Session are authenticated by parties authorized by commission from the Lord Clerk-Register, who is the head or chief clerk of the Court of Session, or Clerk-Register of Council and Session,—and, as such, has been Clerk or Keeper of their Lordships' Books since the origin of the Court. Formerly, all deeds so registered were authenticated by the signature of one of the Principal Clerks of Session, in virtue of a commission from the Lord Clerk-Register. That practice continued down to 28th May 1821, when, by the Act 1 & 2 Geo. IV. cap. 38, sect. 26, it was declared that ^{1 & 2 Geo. IV. c. 38.} the extracts, or office-copies of all deeds, probative writs, and instruments of protest, registered in the Books of Session, should be authenticated by the subscription of the principal keeper of the register of such deeds and instruments, or one of his assistants appointed under the Act 55 Geo. III. cap. 70, sect. 4, and that in the same manner and to the same effect as such extracts had theretofore been authenticated by the signature of a Principal Clerk of Session. The Keeper of the Register of Deeds accordingly authenticates the extracts, whilst the records are in his own office untransmitted; but he holds a commission from the Lord Clerk-

Register for that purpose. The Keeper of the Records (after the record books are transmitted to him) gives out and authenticates the extracts, in virtue of a like commission. In principle, therefore, it is the Clerk of Court who authenticates in the Court of Session, as well as in the Sheriffs' and other Courts.

1635, c. 33.

As a general rule, principal deeds, registered as probative writs, are given back to the party along with the extract or official copies thereof. The principal deeds recorded in the Great Seal Register are never kept by the Lord Clerk-Register or his deputies. They always pass into the hands of the party to whom they belong. In the other registers, where deeds are recorded in virtue of consents to decreet, the principal documents are retained in the register. They are, as you will recollect, the warrants of the decreets of registration; and, as such, they remain in the hands of the Court, just as principal warrants and interlocutors of Court do. But by the Act 1685, cap. 38, a writ, given in to the Register of the Books of Council and Session, may be taken out of that register on application by the party, or one employed by him, if made within six months after ingiving of the deed, and before it has been actually booked. Of the operation of the privilege conferred by this Act, we have an example in the case of *M'Leod*.¹ An error had occurred in completing the testing-clause of a testamentary deed, which might have proved fatal to the deed. The party having died, the deed was given in to be registered for preservation in the Books of Session. It had been entered in the Minute-Book of the Register, and an extract or official copy had been obtained, bearing to be from the register books; but, in point of fact, the deed had not been booked. Within six months after ingiving, the deed was taken out, on application made on behalf of the grantee; on which occasion the extract or official copy was deposited in the Register House, with a borrowing-receipt for the principal deed. The correction of the error in the testing-clause was then made; and the deed, as corrected, returned to the record, all within six months after the original ingiving, and effect was allowed to the correction so made. The same privilege has not been extended to the case of deeds given in to be recorded in the books of the Sheriff Courts.² The Act of 1685 relates only to deeds given in for registration in the Books of Council and Session. In *M'Leod's* case, it was stated by Lord Jeffrey, Ordinary, that much more than mere ingiving to be recorded had taken place in *Brown's* case, before any proposal had been made to supply its defects; but he does not specify any particulars, nor does the report of the case furnish them. He added, however, that even holding it to have been there found incompetent to correct,—solely on the ground that the deed had been put on the Sheriff's register,—he was satisfied that this objection would not apply to *M'Leod's* case, in respect of the special provision in the Act 1685, cap. 38, above quoted.

¹ *M'Leod*, 20th July 1841, 3 D. 1288, affirmed 13th Aug. 1846, 5 Bell's App. 210.

² *Brown*, 11th March 1809, F. C.

In the course of M'Leod's case, a remit was made to the late Mr. Thomas Thomson, then Depute Clerk-Register, which produced a valuable report from him on the practice as to registration of deeds, and withdrawing them from the record under the provisions of the above Act.¹ Mr. Thomson considers the Act as expressly authorizing the withdrawal of writs from the record altogether, rather than the mere borrowing of writs to be returned, but which last practice was by no means of unfrequent occurrence. He states also that no deeds are actually booked until six months after ingiving; and that, when a deed is given in, and taken out, and returned with alterations, it is dealt with as recorded of the date of being returned, not of its first presentment; and this should have been the case with the deed before the Court (in M'Leod's case), though it was not.

The Court will also, in a case of necessity proved to their satisfaction, and notwithstanding that the deeds have been registered for more than six months, and actually booked,—authorize the principal deed to be taken from the record, and produced elsewhere by an officer of Court, if the deed is required at some place not very distant. Deeds have been so taken for production in the Court of Session in Edinburgh;² and authority will be granted to take up the deed, and send it out of this country, in cases where an office copy will not serve, on security for return within a specified time. Sir R. Spotiswoode³ has noted that, on 31st January 1627, a party was allowed to retire a bond out of the register, in order to pursue the debtor thereupon in Dantzic, because the extract would not make faith there. And in the case of Duncan,⁴ the Court ordained the keeper of the records to deliver a principal disposition and settlement to one of the testator's executors, to be sent to the East Indies, in order to the administration of property there, on caution for return within six months; an extract of the principal deed, duly authenticated, being lodged in its stead. In that case, the Lord President Boyle expressed his views on the general subject, of allowing deeds to be taken out of the record, thus:—'All possible precautionary measures should be taken for the preservation of recorded deeds; and, wherever an extract will serve the purpose, the principal should be retained in the register. But, if it be made out that nothing but the production of the principal will do, are records which are intended for the advantage of all concerned in the deeds, to be made the means of depriving them of the whole benefit the deed is intended to confer?' If, however, an extract or office copy will serve the purpose, the principal will not be given up.⁵ But where an excambion took place of entailed lands, lying in two counties, and it was necessary, in

¹ The report is contained in a note printed in 3 D. 1298.

² Gaywood, 17th Jan. 1828, 6 Sh. 363; at Arbroath, Mansfield, 30th June 1840, 2 D. 1235; and at Newcastle, Annandale, 29th Feb. 1828, 6 Sh. 657.

³ Spotiswoode's Practicks, 272.

⁴ Duncan and others, 14th July 1842, 4 D. 1517.

⁵ Birtwhistle, 2d March 1825, 3 Sh. 602.

accordance with the Act authorizing the excambion, to record the contract of excambion in both counties, the Court ordered the deed to be recorded in the county where the smaller portion lay, and to be transmitted by the keeper of the records there to the keeper of the records of the county where the larger portion was situated, to be recorded and retained by him; the warrant of transmission to be kept by the keeper of the first-mentioned record.¹

Formerly, principal writs could be got up from the records only in virtue of warrants from the Inner House of the Court of Session. But by Act of Sederunt, 24th December 1838, sect. 15, when any deeds, deposited with the Lord Clerk-Register, are required in processes before the permanent Lords Ordinary, his Lordship may grant warrant for the transmission thereof, when the production appears to him necessary for the ends of justice; and by Act of Sederunt, 8th June 1850, sect. 2, similar powers are conferred on the Lord Ordinary on the Bills in processes of sequestration.

We have now considered the two principal branches of the clause of registration as quoted from Dallas, viz., the consent to registration, and the object thereof, *i.e.*, decret of Court. The third is the use to be made of the decret, viz., execution against the debtor's person and estate.

EXECUTION. Formerly, the decret, when recorded, was the warrant for separate letters of diligence under which execution proceeded against the party's person and whole estate, heritable and moveable; but in virtue of the Personal Diligence Act,² and relative Act of Sederunt,³ there is now, when desired, annexed to the decret itself, a warrant by the Court authorizing execution against the party's person and personal estate, rendering the separate letters no longer necessary for these purposes. When diligence against the real or heritable estate is contemplated, separate letters of diligence are still necessary.

The clause of registration in its full form further contains the appointment of _____ as procurators for accomplishing the registration, and closes with the words 'etc.' These stand in lieu of the words of the old clause, giving power and commission to the procurators to do all that was needful for the registration, and ratifying and confirming their actings in the premises. In terms of the Conveyancing Acts of 1847, and of sundry other Acts of later date, the express appointment of procurators is no longer required, a short clause of registration being substituted for the old and full clause, and with all the legal import of such clause.

The words with which the clause commences, 'and for more security,' have reference to the time when preferences upon a debtor's estate were regulated, not by the priority of execution, but of decret. The decret, therefore, was truly a perfecting of the security. This we find in the

¹ Oswald, 11th Feb. 1848, 10 D. 678.

³ Act of Sederunt, 24th Dec. 1838, ss.

² 1 & 2 Vict. c. 114, ss. 1, 9.

1, 2.

case of the Earl of Crawford,¹ the report stating that 'sundrie decreets
' beand obtenit against ony man, gif the obtainaris thair of cause arrest
' his maillis, fermis, and duties, in his tenants' hands, the tenants aucht
' and sould pay first to him quha obtenit the first decreet; and he beand
' fully and completely payit, they sould make payment to him quha
' obtenit the second decreet,' and so on.

CHAPTER IV.

THE peculiar province of the testing-clause in a deed is to state those
particulars which, in addition to the subscription of the party and
witnesses, are necessary to make the deed in law a probative writing,
viz., the number of the pages of which the deed, if written on more sheets
than one, consists, the marginal additions, erasures, or alterations made
before subscription, if any, and the precise place or places where these
occur, the name and designation of the writer, and the names and
designations of the witnesses. By universal practice, the number of the
pages, even when the deed is written wholly on a single sheet, and the
place and date of subscription, are likewise mentioned in this clause.
And, when the deed is written on stamped paper, it is usual to say so;
but in deeds wholly written, it is not essential, in point of solemnity, to
specify these last-named particulars, viz., the number of the pages when
there is only one sheet, the place, the date, and the fact of the paper
being stamped. When the deed is partly written, partly printed or
engraved, the Titles Acts of 1858 and 1860 introduce certain additional
solemnities, which will be noticed by and bye. The following is an
example of an ordinary testing-clause in a deed wholly written: 'In
' witness whereof I have subscribed these presents, consisting of this and
' the (nine) preceding pages, with a marginal addition on page first, all
' written on stamped paper by A. B., residing in Edinburgh, clerk to C.
' D., Writer to the Signet (the word "ten," on the second line from the
' top of page third, being delete before subscription) At Edinburgh, the 1st
' day of November 1859, before these witnesses, E. F. accountant, and G.
' H. architect, both residing in Edinburgh.' The clause here given
points out the usual manner of authenticating marginal additions and
deletions; and where erasures or other alterations occur, they will be
similarly dealt with. As to erasures, I may remind you of the case of
Reid,² where an attempt was made unsuccessfully to do away with the
effect of erasures occurring in the Christian name of the disponee
throughout the disposition and settlement of an estate, by introducing a few
explanatory words in the testing-clause. The proper mode of proceeding
in any similar case is to write over the deed as altered, supposing

¹ Earl of Crawford, 5th June 1538, reported by Balfour, p. 391; and Ross, i. 102.

² Reid, March 1835, 13 Sh. 619; affirmed 30th July 1840, 1 Robinson's App. 183.

always that time permits. If that course is not attainable, a declaration ought to be introduced in the deed before subscription, pointing out all the erasures, and declaring them to have been made before subscription. But, even after so authenticating the deed, a fresh deed should if possible be made out; and when it is executed and beyond the reach of reduction, as on deathbed, the first deed should be destroyed. A party's settlement, and the title to an estate, should never be allowed to stand on a deed so bungled as the deed in that case, even if the alterations in it are perfectly authenticated.

DATE OF COM-
PLETION.

In correct practice, the testing-clause is completed, down to the mention of the place of subscription, as soon as the deed is engrossed, and compared with the draft, and before it is subscribed; the comparison enabling the writer to add marginal additions, or to make corrections if required. And the remainder of the clause, containing the place and date of subscription, and the witnesses' names and designations, or the whole clause, as the case may be, ought to be inserted immediately upon the delivery of the deed, if *inter vivos*, or upon its execution, if *mortis causâ*. Usually this is so done. The delivery of an ordinary deed, *inter vivos*, duly executed to the grantee, is a warrant to him to get the testing-clause completed. Where the deed is *mortis causâ*, the immediate completion of the testing-clause may be critically important. In the case of Condie,¹ some of the Judges laid great stress on the fact, that the testing-clauses in two *mortis causâ* deeds under challenge had been completed immediately after subscription. But though the deed is not complete or probative until the testing-clause is written up, because until then the statutory solemnities of authentication are not fully satisfied,—yet, when a bond and disposition in security was found in all respects regular and complete, and moreover was in the hands of an onerous assignee, it was held irrelevant to aver, in objection to the instrument of sasine following upon it, that the bond had not been completed before the sasine was passed.² Lord Moncreiff, Ordinary, in a valuable note to his interlocutor in this case, says, 'When the clause has been filled up, whether at the time or afterwards, it concludes the matter, and must be taken as the due completion of the instrument at its date.' And in the recent case of Rait,³ it was held no objection to an alleged tender of the transfer of bank stock that the testing-clause of the deed of transfer was not filled up at the time of the tender; the deed being then duly executed by the seller.

There has been great laxity of practice among professional men in regard to the completion of this clause, and much latitude has been allowed by the Court in reference to the time at which it can be written. In one case,⁴ it was found competent to complete the testing-clause of a deed, which the parties were under obligation to grant, at the dis-

¹ Condie, 26th June 1823, 2 Sh. 432.

³ Rait, 15th June 1859, 21 D. 965.

² Leith Banking Co., 22d Jan. 1836, 14 Sh. 332.

⁴ Blair, 15th Nov. 1827, 6 Sh. 51.

tance of thirty-two years from the date of the deed, and after certain of the parties to the deed were dead. In another case,¹ it happened that, in the testing-clause of a bond written by James Fraser, the secretary of the bank, one of the witnesses had been originally named and designed 'Robert Gibson, his servant,' in place of 'Robert Dickson, his servant.' The mistake being discovered after a considerable interval of time, and when certain of the parties to the bond had become bankrupt, the following addition was made to the testing-clause: 'I say Robert Dickson, his servant; the word "Gibson" being a chirographical error of the writer in filling up the last line of the testing-clause, all written by the said James Fraser.' The Court unanimously sustained the bond as so corrected. In a later case, where an onerous deed had been executed by the subscription of the parties and of witnesses, but without a testing-clause, the grantee was found entitled to insert that clause, *ex post facto*, (sufficient space for the purpose having been left above the granter's subscription); and in the circumstances of that case it was held irrelevant to aver that at the time of execution neither of the parties intended that the deed should have a testing-clause.² It is not to be understood, however, that as a general rule an averment to the above effect cannot be made. In the case of M'Neillie,³ Lord Ivory spoke of Shaw's as a most extraordinary case; and Lord Deas expressed his understanding that it was not intended there to decide an abstract point. The right to add a testing-clause to a document must therefore in each case be held as depending on its own circumstances. And the power of addition to or alteration on the testing-clause is at an end after the deed has been made the subject of an interlocutor; and equally so when, being entered in a register for preservation or execution, it is permanently in the custody of the keeper of the register. It is then in the hands of the Court or keeper of the record.

By the Titles to Land Acts of 1858 and 1860,⁴ it is made essential as a solemnity in the case of deeds partly printed or engraved, that, in the testing-clause, 'the date, if any, and the names and designations of the witnesses, and the number of the pages of the deed or instrument, if the number be specified, and the name and designation of the writer of the written portions of the body of the deed, writ, or instrument, and of the written portions of the testing-clause, shall be expressed at length in writing' It will be observed that these enactments introduce several solemnities of authentication, in the case of deeds depending on the above Acts for their validity, in addition to the solemnities enacted as to deeds wholly written.

The testing-clause ought all to be written plainly, without crowding, and above the signatures of the parties and witnesses. Therefore, when

¹ Bank of Scotland, 17th Feb. 1790, M. 16,909.

² M'Neillie, 8th July 1858, 20 D. 1229; and 30 Jurist, 727.

³ Shaw, 6th March 1851, 13 D. 877.

⁴ 21 & 22 Vict. c. 76, and 23 & 24 Vict. c. 143.

parties are signing, care should be taken to have sufficient space left vacant above their signatures for the insertion of all that has to go into the testing-clause. A deed in all respects well adjusted in these particulars is entitled to be looked upon with more favour than one which exhibits irregularity or even clumsiness in its completion. A deed in the latter condition at once suggests a style of examination or inquiry for which there may be no real occasion, and which is never thought of when the writer's duties have been well executed. These remarks will be enforced by reference to a case,¹ where the granter of a deed having signed too close to the commencement of the testing-clause, it had been thought necessary to erase some words, replace them in closer writing, crowd in the date above the subscription, and write the names and designations of the witnesses lower down, in such manner, that had the two lines containing them been extended, the first would have passed through the subscription of the party, and the second would have been below it. There was, however, no allegation of fraud, and the deed was sustained. Mr. Duff² says, 'the laxity of practice indicated by the occurrence of such cases is carefully to be avoided. Their decision depends on circumstances, and the conveyancer ought by no means to calculate on similar views being entertained, even in similar circumstances.'

FOREIGN
MATTER OUGHT
TO BE EX-
CLUDED.

As a general rule, all matter foreign to the proper purpose of the clause ought carefully to be excluded. It is clear that a testing-clause containing such foreign matter, and completed *ex intervallo*, would be entitled to no faith as compared with one completed without delay. When an important omission occurs in a deed, the right course is to transcribe the deed, in whole or in part, with the necessary alteration embodied in it. Sometimes, however, it is unavoidable to introduce in the testing-clause an addition to the deed not appropriate to that clause; and if the addition be made in competent form, and duly authenticated, effect is not denied to it as part of the deed.

Two cases may be cited which support this doctrine, and certainly do not encourage the practice. (1.) A trust-disposition and settlement by John Hutchison granted, *inter alia*, provisions in favour of Margaret Coldstream, his wife, which were declared to be in lieu of her legal provisions of terce and *jus relictæ*. In the body of the deed Hutchison alone was stated as the party granting. His wife was not named or referred to, either as a granter or consentor, down to the testing-clause. That clause, commencing in the usual style, 'In witness whereof, these presents, written on this and the nine preceding pages of stamped paper, by,' etc., then ran as follows: 'are subscribed by me, and by the said Margaret Coldstream, my spouse, in token of her consent to, and approval of, this deed, and all the clauses therein contained, at Dundee,' etc. The remainder was in regular form. The deed was duly signed by both parties; the whole, including the testing-clause, was in one and

¹ Dury, 11th March 1753, M. 16,936.

² Duff's Feudal Conveyancing, p. 19.

the same handwriting. The testing-clause bore, not that 'the foregoing deed,' that is, what had been already written, but that 'these presents,' that is, the whole document, 'written by,' etc., were duly signed, and the clause likewise bore that the witnesses attested the subscriptions of both parties. In these circumstances, it was argued that the words expressive of the object of the wife's subscription were part of the deed and not of the testing-clause, and that the writer of these words was not named and designed either in the deed or testing-clause; and the Lord Ordinary (Ivory) found that 'in so far as the deed bore to be subscribed by the wife, "in token of her consent," etc. (as above), it was not, as the deed of the said Margaret Coldstream, probative in terms of law; and that the same falls to be given effect to, exclusively, as the deed of the said John Hutchison.' The Court, however, altered, and found that the deed was validly and regularly executed by Margaret Coldstream, and was probative in terms of law as her deed.¹ A judgment to the same effect was very recently pronounced.²

(2.) The other case on this point is that of Kelso,³ where a deed of consent, produced with an application under the Entail Amendment Act, stated the essential fact, that the heir of entail next in succession to the petitioning heir was twenty-five years of age, in a declaration introduced in the testing-clause,—not, as is usual, and as intended in the Act of Sederunt of 18th November 1848, immediately after the designation of the consenting heir. The Court sustained the deed.

It is useful to have these cases in view, because accidental omissions in deeds are not always to be avoided; and, when a mode of correction has been sustained in Court, it is generally safe to follow it under similar circumstances, if there is not time to write the deed of new. The case of Johnstone will suggest that the important fact of a wife being a party to her husband's settlement, and the statement of the purpose of her subscription of the deed, should not be left to make its appearance only in the testing-clause. She ought to be named as a party, and her consent and approval of the terms of the settlement as affecting her ought to be set forth in the most formal manner in the body of the deed. This is the usual course, and, when it is followed, no question can arise as to these particulars being part of the deed or not. In Kelso's case, the omission supplied in the testing-clause was obviously accidental; probably arising from the deed having been drawn without book. All such additions, however, you will observe, require authentication according to the same rules as those applicable to the body of the deed. The addition must be written before the deed is subscribed, and the testing-clause must be expressed so as to show who is the writer of the addition as well as of the deed, and to give the writer's name and designation. Subscription of the party and witnesses, after the addition is made, will authenticate the whole. And the general principle on which the Court appear to have

¹ Johnstone, 30th June 1843, 5 D. 1297.

² Dunlop, 2d June 1865, 3 Macph. (House of Lords Reports) 46.

³ Kelso, 8th March 1850, 12 D. 918.

proceeded in considering such cases, I think, is that, if there is perfect *bona fides*, what is required is that the essential requisites, statutory or customary, shall be complied with, before the deed is permanently in the hands of the keeper of the public records, or before it has formed the subject of an interlocutor.

CHAPTER V.

BLANKS IN WRITS.

I WILL now explain the general rules as to the legal effect of Blanks in Writs.

In ancient practice, bonds were frequently executed without the insertion of the name of the creditor. In that condition they passed from hand to hand without any deed of transfer, as notes payable to the bearer now do. This practice was introduced under pretence of saving the trouble and expense of conveyances; but it was productive of bad results. The debtor could not plead against a new holder any ground of compensation he might have had against the original creditor.¹ In that respect, he was in the same position as debtors now are in reference to bills and promissory-notes transferred before they fall due. The blank bond, moreover, opened a wide door to fraud, by enabling the holder to transfer the debt, by the mere act of delivery of the bond, and thereby to disappoint the diligence of his creditors. In consequence of these and other objections, it was ordained by the Act 1696, cap. 25, that no bonds, assignations, dispositions, or other deeds be subscribed blank in the name of the grantee; and that such persons be either insert before, or at, the subscribing, or at least in presence of the witnesses to the subscribing, before the delivery; declaring all writs subscribed and delivered blank to be null. The deeds within the scope of this Act appear to be such as require, for their formal completion, the name of the grantee to be filled in, and, when not holograph, the observance of the requirements of the Statutes regarding the authentication of deeds in general.²

The nullity introduced by the Act, however, strikes only at writs both subscribed and delivered blank; and bonds, which were blank in the creditor's name when subscribed, have been sustained when evidence could not be produced that they were blank when delivered.³ And where a bond was *ex facie* regular and complete, and it was not averred that it was blank when delivered, or had been obtained by force or fraud, it was found not relevant even to allege that the sum was blank at the time of the subscription.⁴ On the other hand, where there was sufficient

¹ Henderson, 27th February 1668, M. 1653.

² Menzies, p. 133.

³ Sinclair, 13th June 1746, M. 11,559; Ruddiman, 30th July 1746, M. 11,562.

⁴ Baillie, 25th June 1828, 6 Sh. 1016.

evidence to presume that the deed, when subscribed, was blank in the name of the grantee, the Court threw upon the user of the deed the burden of proving that the blank was filled up at subscribing thereof, or afterwards in presence of the witnesses signing the same.¹ And where a blank, left for the first substitute in the destination of heirs, in a testamentary deed, was filled up in accordance with probative written instructions, given by the testator, after subscription of the principal deed, the substitution was held as still blank.² The proper mode of proceeding in such a case would be, to make a nomination of heirs-substitute by codicil; and which could be as easily executed as the instructions in this case.

Blanks occurring in deeds have an effect more or less important with reference to the subject of the deed. Their relative position also is sometimes a material element in determining whether they annul the deed or not. A trust-deed of Scotch heritage was signed in India, with blanks in it for insertion of the names of the trustees, and of almost all the important purposes of the trust. These were filled up, after the deed was sent to Scotland; but, as it happened, within one month of the death of the granter, and without the possibility of showing the deed, as filled up, to the granter and witnesses, who remained in India. The deed was found null both at Common Law and under the Act 1696.³ And where the amount of the redemption-money of an annuity was filled up in the bond of annuity after the same was executed, and, as alleged, after it was delivered, and without the obligant's consent, and it was also alleged that the amount filled up was larger than had been stipulated and agreed on,—issues were adjusted to try the question; the burden of proving that the blank had been filled in with consent of the obligant being laid on the holder.⁴ The case of the Earl of Buchan is very important, as pointing out the great danger incident to the subscription of deeds, whilst blanks are in them, and the difficulty of holding what is subsequently inserted in the blank probative. A very difficult question arose, in the case of Stewart,⁵ regarding the legal consequence of a blank in a trust-deed, as to the amount of the provisions intended for the truster's younger children. The trustees, in virtue of powers in the trust-deed, had sold an estate, and they had a considerable reversion of the price in their hands after paying debts, etc. The question which arose was,—whether the peculiar terms of the trust-deed bestowed on them the power of apportioning the reversion among the heir and the younger children respectively. In the circumstances, the Court, by a bare majority, and after a contrary judgment, held the trustees to have a discretionary power under the trust-deed, to fix the amount of the provisions payable to the younger children,—subject always to this limitation (as was held to be prescribed by the

¹ Donaldson, 10th Feb. and 12th July 1749, M. 9081.

² Kennedy, 13th July 1722, M. 1681.

³ Pentland, 22d May 1829, 7 Sh. 640.

⁴ Earl of Buchan, 20th Feb. 1857, 19 D. 551.

⁵ Stewart, 26th Nov. 1813, F. C.

deed), that the heir should receive, at least, double the amount given to each of the younger children. They accordingly remitted to the trustees to suggest the amount of the younger children's provisions for the consideration of the Court.

We have a case in which a trust-settlement, for the foundation of an hospital for boys, being left with blanks both as to the sum to be accumulated and laid out by the trustees, and the number of the boys to be admitted, the House of Lords, reversing the decision of the Court of Session, held the appointment uncertain, and therefore inept.¹ The Court here had been of opinion that the deed gave sufficient directions notwithstanding the blanks; and, in the recent case of the Morgan succession, Lord Chancellor Chelmsford, in delivering judgment,² indicates plainly that he would have decided Ewen's appeal in conformity with the views of the Court of Session. After stating the circumstances of Ewen's case, he says, 'There can be little doubt that a bequest of this character, in an English will, would have received a much more favourable construction. And your Lordships will probably think that Ewen and the Magistrates of Montrose can only be urged as an authority, where the circumstances of the case to which it is sought to be applied are precisely similar to the circumstances of that case.' That is to say, in effect, that Ewen's case is no longer any authority at all, as 'precisely similar' circumstances cannot again occur.

BLANKS DO NOT
NECESSARILY
INVALIDATE
THE WHOLE
DEED.

But the existence of blanks in a deed, or their legal existence,—supposing that, in point of fact, they have been filled up irregularly,—does not necessarily invalidate the whole deed. Thus, where a holograph bond to a creditor duly named, with a substitution blank at the time of execution, but which was afterwards filled up in the handwriting of a third party,—the deed, being all the time in the creditor's possession, was dealt with in the same way as if the substitution had been still blank; notwithstanding that the bond, being granted in 1694, did not fall under the sanction of the posterior Act of 1696; that is to say, the bond was held good to the institute, and to contain no substitution.³ And a deed of entail, which was blank at the time of subscription, in regard to the name of one of the postponed substitutes, was sustained as a valid deed in favour of the institute and prior substitutes.⁴

A general view of this subject is given in Abernethie's case by Lord Jeffrey, Ordinary, who says, 'There may be blanks (or other nullities) occurring in such parts of a deed as to make the whole null; a blank in the name of the property disposed would be of this nature, though not under the Act 1696; a blank in the name of the donee, where there was no substitution, would be equally fatal, both under the Act, and at Common Law; and probably a blank in the name of the insti-

¹ Ewen, 5th Feb. 1828, 6 Sh. 479; as reversed, 17th Nov. 1830, 4 Wil. & Sh. 346.

² 3 Macq. App. 154.

³ Cairns, 21st Dec. 1742, M. 1673.

⁴ Abernethie, 16th Jan. 1835, 13 Sh. 263.

'tute would be in the same situation. But it is extravagant to maintain 'that all blanks which vary the deed from what it would have been, if 'they had been originally filled up, must have this effect.' Lord Jeffrey further suggests, that the case might have been different had the blank occurred in the first branch of the destination, that naming the institute. That view is borne out by the cases of *Kedder* and *Shepherd*, both formerly cited.

The Act of 1696 is expressly declared not to extend to the indorsa- INDORSA-
tions of bills of exchange, and notes of trading companies. Bills blank in the drawee's or payee's name were formerly held to be struck at by this Act. But Professor Bell says,¹ 'The view now taken is, that the 'Statute does not apply to the case of bills, and that the acceptance is 'an undertaking to pay to the person who shall have right to the docu-
'ment, like a note payable to the bearer.'² This doctrine is now, of course, subject to the modification introduced by the *Mercantile Law Amendment Act*,³ which makes the holder of a bill or note, indorsed after maturity, liable to the exceptions pleadable against the same in the hands of the indorser.

The document known as 'iron scrip' is not, however, on the same IRON SCRIP.
footing as a bill. It, no doubt, contains an engagement to deliver a certain quantity of iron 'to the party lodging this document with me,' and was held not struck at by the Act in the case of *Dimmack*.⁴ The same was held by the Court of Session in the case of *Dixon*;⁵ but in the House of Lords the Lord Chancellor stated his opinion that such an obligation was invalid in the hands of a third party. His Lordship, after noticing that bills had special privileges, by the Law Merchant, and promissory-notes, by Statute, went on to say, as to other writings:—'The 'law does not, either in Scotland or England, enable any man, by a 'written engagement, to give a floating right of action at the suit of any 'one into whose hands the writing may come, and who may thus 'acquire a right of action, better than the right of him under whom he 'derives title.' These are just the grounds on which the Scotch Act of 1696 against blank writs was passed.

Until the passing of the Conveyancing Acts of 1845 and 1847, almost all the deeds thereby affected had certain blanks in them, which it had become usual in practice not to fill up. These were, *ex facie*, intended in dispositions for the insertion of the names of procurators for resignation; and bailies for giving sasine of the lands disposed; and of procurators for registration in the books of a Court of Justice. But, in all such deeds, according to the new forms, and in deeds in general, in virtue of the Titles Act of 1860, the occasion for such blanks is now done away; and there ought now to be no blanks in deeds at the time

¹ 1 Bell's Comm. 391.

² Ogilvie, 26th June 1804, M. App. Bill
of Exchange, No. 17.

³ 19 & 20 Vict. c. 60. s. 16.

⁴ Dimmack, 1st February 1856, 18 D.
428.

⁵ Dixon, 21st February 1854, 16 D.
619; 29th July 1856, 3 Macq. App. 1.

of their subscription. An attempt was lately made to show that the Act of 1860 did not authorize the short form of registration clause in a lease of minerals, but it was not successful.¹

Erskine² speaks of bonds being sustained, though it appears, from ocular inspection, that the creditor's name was not inserted by the writer of the deed; but bonds have no privilege in that particular. On the contrary, the creditor's name is one of the essentials of every bond; and, if the name of the writer of that essential part of the bond is not mentioned, I see no reason to doubt that the bond would be held improbativæ.

¹ Dimpsey, 17th July 1863, 1 Macph. 1126.

² Erskine, iii. 2. 6.

BRANCH II.

DEEDS RELATING TO PERSONAL RIGHTS.

TITLE I.—THE PERSONAL BOND.

CHAPTER I.

WE are now about to enter upon a leading branch of the subject of the constitution, transmission, and extinction of moveable or personal rights; one of the principal divisions of this course. It is already very comprehensive, including writings of great diversity of structure, and open indefinitely to further extension and variety, and it must be regarded as hardly less important than the division relative to heritable rights. It would be impossible, under any circumstances, to enter in the way of exposition into the particulars of all the deeds connected with either branch. Nor would time occupied in so doing be well spent. Exemplification might be useful, as far as it went, but acquaintance with existing forms is not enough for a Conveyancer. Every year is adding to the variety of writings to be dealt with. And the exigencies of professional life—arising in connexion with social or commercial arrangements, with parliamentary proceedings, or from other causes—involve the necessity for the prompt preparation of deeds and clauses, for many of which there can be no styles. Reliance on the knowledge of the greatest number of existing forms will never make any one equal to these occasions. What is wanted (in addition to good general preparation) is knowledge of essential principles and ordinary forms, together with practice; in other words, the knowledge of principles and of forms as bearing on and illustrating each other. With these, and full acquaintance with what in each case is wanted, there will be the faculty of framing the clauses adapted to the particular circumstances of the case; the faculty of expressing, in appropriate language, obligation, condition, and qualification, or whatever the case may require. This often has to be done under considerable pressure; but the man of business must have the requisite faculty in himself, without, as matter of necessity, recurring to books.

But, whilst it is proper to warn you against too exclusive reliance on the knowledge of styles, it would be a grave error to lead you either to

undervalue such knowledge, or to think there is great difficulty, on the part of any one of good professional and general education, in framing deeds or clauses of unusual occurrence. Obligations in most cases require and are made effectual by the same leading words; agreements, conditions, etc., are, of course, very various in their objects, but, as far as technicalities are concerned, they are always much the same; and, as to the proper subject-matter, the use of plain and distinct language is all that is wanted. I will now proceed to the exposition of the styles and technicalities of the most important of the ordinary deeds connected with moveable or personal rights, which, besides meeting the bulk of everyday practice, are the main groundwork of what is only occasional and unusual. And I commence with the personal bond.

THE PERSONAL
BOND.
TICKET.

The personal bond, as used in Scotland, has obviously a close connexion with the writing at one time in use here, called a 'ticket,' the form of which was as follows:—'I, A. B., grant me to be justly addebted to C. D. in the sum of £ Scots, which I bind and oblige me, my heirs, successors, and executors to pay to the said C. D., his heirs or assignees, or any having his order, and that against the day of next, under the penalty of £ Scots in case of failure.—In witness whereof,' etc.

One peculiarity of this writing, you will observe, is, that it is payable to the creditor named, or any one having his order. Blank indorsation of a ticket, as in the case of a bill, implied an order by the creditor or holder to pay to the bearer; and the ticket, in virtue of its own expressed terms, on being blank indorsed by the first holder, passed from hand to hand by mere delivery, and without any deed of transfer. Writs, in similar form, were common in England also, where they were called 'bills,' and the bonds of the York Buildings Company appear to have been so far in the same form, that they were payable to one having right by mere indorsement. The transfer of tickets, however, by mere delivery, was struck at by the Act 1696, cap. 25, directed against blank bonds, assignations, or other deeds, and the use of them was consequently given up in Scotland.

CLAUSES.

The personal bond, as now in use, consists of the following clauses:—

1. The narrative.
2. The obligation to pay.
3. The clause of registration. And
4. The testing-clause.

NARRATIVE.

The narrative runs thus—where the bond is granted in consideration of the instant advance of the money lent:—'I, A., grant me to have instantly borrowed and received from B. the sum of ' (the particular sum being always stated in words). In this clause, care must be taken to name and design the parties correctly, and so as to distinguish them from all others. If the loan has been advanced prior to the granting of the bond, in place of saying 'grant me to have instantly borrowed,'

etc, the words used will be, 'grant me, on the day of , notwithstanding the date hereof, to have borrowed,' etc. And, in the case of a debt not arising from money advanced by way of loan, but consisting of the balance of an account or the like, the words will be, 'grant me 'to be justly indebted and owing to B. the sum of £ , being the 'balance due to him on an account current between us, commencing on 'the and ending on the . ' When there is an actual advance, the true date of it ought in all cases to be accurately stated in words; and if there is any further debt due by the same debtor to the same creditor, or if there are unsettled transactions between them, the bond ought to be so expressed as to show clearly whether it relates to a new loan, or to money formerly due.

In cases of ordinary loan, after the words stating the granter to have borrowed the sum in question, there frequently occur the following words:—'of which sum I hereby acknowledge the receipt, renouncing all exceptions to the contrary,' but these words are not indispensable; the acknowledgment of receipt is expressly embodied in the first clause. The renunciation of exceptions to the contrary is taken from the Civil Law, and has reference to a time when the borrower of money, by denying the receipt thereof, could throw on the lender the burden of proving the payment or advance.¹ The same exception can still be alleged by the granter of a bond against the claim on the bond; but after the bond is delivered to the lender, it lies on the borrower to prove the negative, not on the lender to prove the affirmative of the advance.

The obligation or bond next follows in such words as these: OBLIGATION TO
'which sum I bind myself and my heirs, executors, and representatives PAY.
'whomsoever, without the necessity of discussing them in their order,
'to repay to the said B. and his heirs, executors, or assignees, at and
'within' (some place specified), 'at the term of' (usually the first term
of Whitsunday or Martinmas which shall happen more than three
months after the date of bond), 'with a fifth part more of penalty in
'case of failure, and the interest of the said principal sum at the rate
'of per cent. per annum, from and after the date of delivery hereof to
'the said term of payment, and daily, monthly, yearly, and continually
'thereafter during the not payment.'

The granter here binds himself and his heirs, executors, and representatives whomsoever, without the necessity of discussing them in their order. There must be express words of obligation. The importance of this is obvious; without them the deed is not a bond or obligation. This will be illustrated by the case of *Hamiltons*.² The case, however, is very special. In connexion with the present subject, I refer only to what is said by the Judges at advising that case, regarding the difference between a mere recital that a debt is due and a conveyance in security, and an acknowledgment of debt and bond for payment. I may notice

¹ Ross, i. 53.

² *Hamiltons*, 25th March 1853, 15 D. 594.

also the case of *Gammell*,¹ where an attempt was made by an heir of entail to charge his entailed estate, under the Rutherfurd (Entail Amendment) Act, with an obligation which did not bind himself or his heirs personally, but only the entailed estate, for payment of the sum to be created a burden thereon. The Court refused to approve of the deed, the Lord Justice-General M'Neill remarking: 'I have little difficulty about this matter. We are sitting here, not to make experiments, but to administer the Statute; and I see nothing about such a thing as this in the Statute.' His Lordship, you will observe, would not call the deed 'a bond.' In framing a bond, a personal obligation ought to be expressly imposed. Where the granter of a bond bound his heirs and executors, without expressly binding himself, it was objected that the bond was null, as all obligations behoved to begin with the granter; but the bond was sustained.²

The granter of the bond binds also (along with himself) his heirs, executors, and representatives whomsoever; and, should he die before the bond is discharged, the debt will affect his whole heirs and successors and estate, except any estate which he holds in virtue of a valid and effectual entail, and the heirs of entail therein. The result in these particulars would be the same though he should only bind himself; but the usual style of the clause should be followed. This is specially necessary in connexion with the renunciation by the granter of the benefit of discussion, competent by law to his heirs; that is, the right of an heir in heritable estate, not primarily liable in payment of a particular debt due by his ancestor, to require that the creditor shall discuss the heir or heirs in heritable estate legally liable before him in payment of such debt, prior to calling on him for payment.

DISCUSSION.

It is proper that every personal bond should relieve the creditor from the necessity of discussing the debtor's heirs in the order of their legal liability. No doubt, whether the benefit of discussion is renounced or not, the heirs in the debtor's whole estate (so far as it was liable in his person to be affected by his debts) are liable ultimately, that is to say, they are all liable, rather than that the debt shall remain unpaid to the creditor. But, when the benefit of discussion is not renounced, the heirs in the debtor's heritable estate can be sued for payment only in a particular order; and each heir, respectively, must be first discussed in his own order before the suit is followed out against the heir in the next class.³ The discussion requires the execution of legal diligence against the person of the heirs in the heritable estate by decret, charge of horning and registration; against their personal estate by arrestment and forthcoming, or poiding, and sale; and against their heritable estate by adjudication;⁴ and apparently the heritable estate ought to be brought to sale.⁵ But the rules as to liability and discussion are open to much

¹ *Gammell*, 16th July 1856, 18 D. 1297.

² *Lord Grange*, 21st Jan. 1708, M. 5911.

³ *Stair*, iii. 5. 17, and iv. 22. 22.

⁴ *Stair*, iii. 5. 21; *Erskine*, iii. 8. 53;

Edgar, 22d March 1627, M. 3576.

⁵ *Bankton*, i. 23. 30; *Torphichen*, 29th

Jan. 1679, M. 3577. See also *Bell's Law*

Dictionary, voce 'Discussion.'

modification ; and, when the benefit of discussion is not renounced, the creditor may have questions of much nicety to consider in the proceedings for recovery of his debt:

The renunciation of the benefit of discussion, however, when granted, merely imposes on the debtor's heirs, or such of them as shall be sued for payment, in place of upon the creditor, the trouble and responsibility of finding out the proper debtor, and of bringing the burden home to him. When a party lends money, he looks to the borrower, and his estate as it stands as a whole ; the lender has no thought of subjecting himself to the burden and charge of discussing first this, and then that, class of heirs, and their respective portions of the estate, until he has, perhaps by piecemeal, recovered his whole debt. It is very right that, when the succession to lands or other estate devolves upon different heirs, the debts of the common ancestor should be formally undertaken by the heirs respectively, according to their several liabilities,—and that new arrangements should be made with the creditors, whereby the heirs primarily liable (as in questions *inter hæredes*) shall become the sole debtors, and the others shall be relieved and discharged. The Court indeed will, under special circumstances, hold the heirs not primarily liable to have been discharged without any express arrangement to that effect having been made.¹ But the discharge of those not primarily liable, if it is to be granted at all, should be matter of special arrangement in each case. I do not see any principle on which the creditor should allow the mere decease of the original debtor to alter his own position as regards his claim on such debtor's estate, more especially as the creditor, much more than the heirs, may have difficulty in ascertaining in what order the heirs are liable ; and the doing of diligence, either personal or real, is always an unpleasant and often very critical proceeding.

It may here be convenient to explain the legal order of the liability among the debtor's heirs in heritable estate, *inter se* ; and likewise to the creditor when the benefit of discussion is not renounced.

(1.) The liability falls in the first place on the 'heir-of-line,' or as he is indiscriminately called the 'heir-at-law,' 'heir whatsoever,' or 'heir-general.' Such heir succeeds by law (as contradistinguished from special destination) to the *universitas* of the debtor's heritage, that is, the heritable estate to which the debtor succeeded as heir-at-law of some predecessor, and which he did not purchase or acquire otherwise than by succession as such heir. The heir-at-law succeeds also to all leasehold rights held by the predecessor, and howsoever acquired ; but he has no right to any heritage or leases which are subject to special destination in favour of other parties. Such heir is liable by law, in the first place, for all debts of which the payment is not the subject of special regulation ; and for such debts he is liable universally, that is, to the extent of his whole estate, heritable and moveable.²

ORDER OF
LIABILITY
AMONG HEIRS.

HEIR-OF-LINE.

¹ Threipland, 23d Feb. 1855, 17 D. 487.
See also Wyllie, 13th Dec. 1853, 16 D.
180.

² Stair, iii. 5. 17 ; Erskine, iii. 8. 50 ;
Creditors of Fairly, 12th Feb. 1630, M.
3559 ; Brown, 19th Nov. 1782, M. 5228.

HEIR OF
CONQUEST.

(2.) The liability falls next on the heir of conquest, who also is called an heir-at-law, because he succeeds, by the disposition of law, to the *universitas* of the conquest or lands (not held by leases) acquired by the deceased otherwise than by succession. Such heir is universally liable for the deceased's debts and obligations, next after the heir-of-line.¹ In Fairly's case, the heir-of-line was himself the creditor; but he renounced to be heir, and was found entitled to prosecute the heir of conquest for payment.

HEIRS-MALE
GENERAL.

(3.) Heirs-male general, served or decerned in that character, without reference to any particular estate, have likewise right to the *universitas* of lands, or other heritable estate destined to heirs-male, and are liable universally for their ancestor's debts, but only after the heirs of line and conquest.²

HEIR OF A
MARRIAGE.
HEIR OF PRO-
VISION OR OF
TAILLIE.

(4.) and (5.) It does not appear to be settled by any decision, whether the heir taking heritable estate, as heir of provision under a marriage-contract, or as heir of provision under some other deed (including the heir under an entail, which does not prevent the contraction of debt), is next liable. Stair says,³ that heirs of a marriage follow next after heirs-male general, because they are nearest in blood; and Erskine, in his Principles,⁴ expresses the same opinion; stating, as a further reason, that other heirs of taillie may possibly be strangers. But Bankton⁵ holds the heirs of taillie as liable before the heirs of a marriage; the latter being not only heirs, but, in some degree, creditors of the deceased. Erskine, in his Institute,⁶ adopts Bankton's view; and Mr. Brodie⁷ says, that what Lord Stair 'lays down as to heirs of a marriage being liable before heirs of provision, simply, has been much doubted,' adding, 'I think with reason, considering that to use our author's (Lord Stair's) language, iii. 5. 19, heirs 'of marriage are heirs of provision, and partly creditors.' The heir first entitled to take under a marriage-contract appears to be eminently a creditor in any question *inter hæredes*. It will be kept in view, however, that it is only such first heir that is a creditor under the marriage-contract. After such heir has succeeded, those who take as heirs under the contract, failing him, are merely heirs of provision, and would seem to be in the same position, as regards this question, with other heirs of provision or of taillie. Heirs of a marriage, and other heirs of provision, and of taillie, however, are liable, not universally, but only to the amount of the value of the estate to which they respectively succeed.⁸

The order of liability then, of the heirs in heritable estate, *inter se*, at Common Law is—(1.) Heirs-of-line; (2.) Heirs of conquest; (3.) Heirs-male general; (4.) Heirs of provision or of taillie; and (lastly) Heirs of a marriage; or, it may be, (4.) Heirs of a marriage; and (lastly) Other

¹ Stair & Erskine, as above; Fairlie, 21st July 1630, M. 3560.

² Stair & Erskine, as above; Dunbar, 22d June 1621, M. 3559.

³ Stair, iii. 5. 17.

⁴ Erskine's Principles, iii. 8. 24.

⁵ Bankton, iii. 5. 69.

⁶ Erskine, iii. 8. 52.

⁷ Brodie's Stair, p. 534, Note C.

⁸ Baird, 16th July 1766, M. 14,019, and

5 Br. Sup. 927.

heirs of provision or of taillie. The order is the same in the case of an obligation simply binding the granter, or binding him and his heirs, executors, and successors whatsoever. But, where the debts are expressly laid on the debtor's heir-male, or any special heir, the heir specially bound is primarily liable. The creditor may sue such heir without taking notice of the heir-of-line, against whom he cannot insist till the heir specially bound is first discussed.¹ And, when an obligant binds one class of heirs *subsidiarie* only, the heirs so bound, though ultimately liable, rather than that the debt shall not be paid, are entitled to require the discussion of the other heirs.² Again, where the obligation is granted relatively to a particular subject, for example, an obligation in a lease of lands, to pay the tenant for meliorations at the expiry of the lease, the heir who succeeds in that subject is primarily liable.³ And such heir has no right to require the discussion of any other heir. On the contrary, in connexion with such obligations, the other heirs can insist on the benefit of discussion as against him.⁴ Under obligations in leases, however, the other heirs are not absolutely free of liability in a question with the tenant during the currency of the lease; at least if the obligation constituted a proper personal claim against the deceased landlord. It was so found as to an obligation to pay a tenant at the end of his lease, for meliorations not exceeding a specified amount, in respect that the tenant had relieved the landlord at the commencement of his lease of an obligation then prestable by the landlord to the outgoing tenant.⁵

Where a catholic security is created over several lands, part of which falls to the heir-of-line, part to the heir-male, these heirs respectively are liable proportionally, according to the value of the lands burdened to which they respectively succeed.⁶ I have to observe, also, that the renunciation, or the absence of renunciation, of the benefit of discussion, affects only the liability to the creditor of the several heirs in the debtor's heritable estate. It does not affect the position or liability of the executors or heirs in the debtor's moveable estate. When the debt is personal, as in the case of a bond in the terms before quoted, the executors are primarily liable in any question between the heirs in heritable estate and them. When the debt is heritable, on the other hand, the heirs in heritable estate are primarily liable in any question with the executors. But, even when the debt is personal, it is not incumbent on the creditor—whether the benefit of discussion is renounced or not—to discuss the executors first. He may, in his option, sue them either by themselves or along with the heirs primarily liable,⁷ or the creditor may sue the

EXECUTORS.

¹ Stair, iii. 5. 17; Erskine, iii. 8. 52; Blair, 18th Feb. 1663, M. 3571.

² Burnett, 4th March 1854, 16 D. 780.

³ M'Gillivray's Executors, 18th July 1857, 19 D. 1099.

⁴ Stair, iii. 5. 17; Erskine, iii. 8. 52; Robertson's Creditors, 13th Dec. 1803, M. App. 'Competition,' No. 2.

⁵ M'Gillivray's Executors, above cited.

The views stated in this case by the Court, who were not unanimous, are very instructive.

⁶ Rose, 17th Jan. 1786, M. 14,955, and 5229; as reversed, 2d April 1787, 3 Paton's App. 66.

⁷ Stair, iii. 5. 13, also iii. 8. 65; Erskine, iii. 9. 48; Carnegie, 24th Feb. 1627, M. 3564.

heir without calling the executors.¹ But, when a debt, primarily affecting the executor, is recovered by the creditor from the heir, or *vice versa*,—and, again, when the heir of line pays a debt, for which the heir of conquest, or any other heir, is primarily liable,—the heir or executor liable only *subsidiarie* is entitled, after having made payment, to operate his own relief and payment from the executors or heir primarily liable.² In such case, however, the party called on for payment, though liable to the creditor, is not the primary or proper debtor. He would, therefore, on making payment to the creditor, take from him a discharge of his own liability to such creditor, and an assignation of the creditor's right to the debt. The object of taking such assignation is that he may be enabled to operate recourse and payment against the proper debtor;—just as we shall see that a cautioner would do on making payment of a debt which the principal debtor had failed to pay; for, in the circumstances stated, the executors and the heirs stand respectively in the relation of principals and cautioners for each other.

The personal bond sometimes gives a full description of the several characters of heirs in heritable estate; but the general description is preferable, both on account of its brevity, and because it is in conformity with the style of the personal obligation applicable to a bond and disposition in security annexed to the Heritable Securities Act of 1847,³ which has the sanction of the late Lord Rutherford's approval, than which nothing can be more assuring to a Conveyancer.

SUCCESSION
TO PERSONAL
BONDS.

The obligation to pay is in favour of the creditor and his heirs, executors, or assignees. Personal bonds bearing interest were, by our old law, regarded as heritable rights in the creditor, as *quasi feuda* or *feuda pecunia*, because, by the fixed yearly profits arising from them, they bore some resemblance to rights properly feudal; and the genius of our law, at the period referred to, was to extend the operation of feudal principles as far as possible. But this rule did not operate where the creditor himself had not shown that his loan was to have something of a permanent character. Hence the bond was deemed moveable till the term of payment (which is still the rule of law on this point), because the creditor was presumed to intend to turn it into money at that term, and it was even held moveable until the term of payment, although it bore interest from its date, if the interest was payable at the same term with the principal sum itself; because the clause of interest was presumed in that case to be inserted, not with a view to make the sum heritable, but simply that the money might not be useless and unprofitable in the meantime.⁴ But, if the term of payment of the interest was prior to that of the payment of the principal, the latter fell to the heir, if the creditor survived the first term at which the interest became due, though he died before

¹ British Linen Company, 28th May 1850, 12 D. 949.

² Stair, iii. 5. 13; Erskine, iii. 8. 53; Dundas, 27th Nov. 1804, M. App. 'Discussion,' No. 1.

³ 10 & 11 Vict. c. 50.

⁴ Douglas, 26th Feb. 1629, M. 5504; Meuse, 22d Nov. 1748, M. 5506; Stewart, 9th July 1765, M. 5510.

the principal sum itself was payable; because at the term of payment of the interest he was presently entitled to a yearly profit on his bond, which was accounted sufficient to make it heritable.¹ Moreover, when the term of payment of the principal was distant or uncertain, the bond was reckoned heritable even before that term; because the distance or uncertainty afforded evidence, or at least the presumption, that the creditor intended from the beginning to employ his money for a period of years together at interest.²

After the term of payment of the principal, all such bonds were, by our old law, heritable as to the creditor's succession, because the creditor, by not taking payment, was presumed to have resolved to let his money lie with the debtor for a yearly profit.³ In intestate succession, the state of the law, here described, was very prejudicial to the younger children in families, giving to the eldest son or heir, in such case, money due on personal bonds as well as land. In order to enlarge the provision of younger children, the Act 1641, cap. 57, declared all sums^{1641, c. 57.} contained in contracts, and obligations, carrying a clause of interest, to belong to the bairns and next of kin of the deceased. This Statute fell under the Act rescissory of Charles II. 1661, cap. 15; but the Act^{1661, c. 15.} 1661, cap. 32, passed immediately afterwards, declared all contracts and obligations for sums of money payable to parties at any time, made since 16th November 1641 (the date of the former Act), and in time coming, containing clauses for payment of annual-rent and profit, to be moveable bonds; except (1.) when they bear an express obligation to infest, in which case they obviously affect lands or other heritable property,—in other words, 'heritable bonds,' which have always fallen to the heir in preference to the next of kin or executors; and (2.) when they are conceived in favour of heirs and assignees, secluding executors. In either of these cases, the sums are ordained to be heritable, and pertain to the heir; otherwise to appertain to the next of kin, executors and legators, according to the law of moveables. But it is declared that all such bonds, *quoad fiscum*, are to remain in the same condition as before the said 16th November 1641—that they are not to fall under the compass of the single escheat; nor is any part thereof to pertain to the relict, *jure relictæ*, when made to the husband, nor to the husband *jure mariti*, when made to the wife, unless the relict or husband has otherways right. By '*fiscus*,' Erskine⁴ says the Romans understood the Crown revenue; and by the same word, in our Statute, he says is meant the forfeiture to the Crown (confiscation) of a party's moveable estate, incurred on conviction of certain crimes, and which, until 1748,⁵ so fell by mere failure to pay a civil debt, if followed by denunciation as rebel on letters of horning. Such forfeiture is the single escheat, and it is excluded by the Statute of 1661, with respect to

¹ Gordon, 31st July 1666, M. 5505; Ramsay, 20th Dec. 1682, M. 4234.

² Falconer, 15th Jan. 1628, M. 5465: Gray, 13th July 1666, M. 3629.

³ Erskine, ii. 2. 9.

⁴ Erskine, ii. 2. 10.

⁵ 20 Geo. II. c. 50, s. 11.

bonds bearing interest. The *jus mariti* has already been explained. We shall explain as to the *jus relictæ* at a future stage of the course. But the *jus mariti*, though excluded by the Act as to a personal bond with a clause of interest, to which a wife succeeds after the term of payment has arrived, is not excluded in reference to personal bonds, though bearing a clause of interest, granted to married women, or to which they succeed before the term of payment shall have come.¹

The bond, when payable to heirs and executors generally, descends to the executors solely. The same result takes place, though the bond is payable to 'heirs,' without mentioning executors; both because the Act 1661 is express in giving all such bonds to the executors, if they are not secluded, and because the word 'heir' is a generic and flexible term, and, when used with reference to a moveable right, means the heir *in mobilibus*, or executor. The case is different when the bond is taken payable to heirs-male, or to a series of heirs; for example,—'to A, and 'the heirs of his body, and his or their assignees; whom failing, to B, 'and the heirs of his body, and his or their assignees,' etc., or with some such destination; because special destination to a particular class of heirs gives a preferable right to such heirs, and so operates the exclusion of executors, just as much as an express clause of exclusion would.² But, when a bond of provision was granted by a father to his daughter, or the heirs of her body, or her assignees, and, in case of her dying without heirs of her body (which case happened), and without uplifting, or disposing of the provision, the same was destined to certain heirs specially named; the bond was found moveable in her person, and transmissible to her assignee under a testament executed on deathbed, in preference to the special heirs.³

SECLUSION OF
EXECUTORS.

The seclusion of executors is expressed as follows: 'secluding always 'his executors, as well from the principal sum as from the interest 'thereof, and penalty.' The object of the seclusion from interest is to give interest in arrear and current at the creditor's death to the heir, in preference to the executor. The future interest would fall to the heir, as accessory to the principal sum. Such bonds are expressly excepted from the operation of the Act; and it has been held that they fall to the heir *destinatione*.⁴ In the case of Ross, before referred to,⁵ the Court, by a majority, held that such bonds did not fall under a will executed in the English form, but fell to the creditor's heir in heritable estate. The judgment, however, was reclaimed against, and the case is stated to have been compromised. The point, therefore, must be regarded as not authoritatively settled. Such bonds, when carried to the heir of the original creditor, by service, which is the appropriate form of title in the person of the heir, continue heritable in his person.⁶ As the exclusion of executors is contrary to the ordinary rule in framing bonds, it

¹ Gray, 11th March 1859, 21 D. 709.

² Erskine, ii. 2. 11.

³ Duff, 15th June 1745, M. 5429.

⁴ M'Kay, 12th Jan. 1725, M. 3224.

⁵ Ross, 4th July 1809, F. C.

⁶ M'Kay's case.

ought not to be introduced without express instructions from the lender, following upon a distinct explanation to him of the effect of the exclusion upon the rights of heirs and next of kin, *ab intestato*, in bonds so destined; the law of deathbed as affecting the power of testing upon them; and the necessity of testing upon them in the Scotch form, if they are to form the subject of a testamentary deed; for, though doubts on all these points were suggested in Ross's case, the majority of the Court held that, as regards succession, deathbed, and the form of testament or deed of settlement, the bond was in the same situation as land. Legal advisers ought, of course, as far as possible, to obviate the occurrence of questions on any of the above points.

The principal sum in the bond, wherever it occurs, and all dates, ought to be written in words at length, and not in figures.

The term of payment, as already stated, is usually the first term of Whitsunday or Martinmas, not being less than three months after the date of the bond.

The bond stipulates for 'a fifth part more of penalty in case of PENALTY. failure in payment of the principal sum.' The relative term 'fifth part more' suits every case, and is better than the specification of a sum, intended to be equal to a fifth, as in the leading form in the Style Book.¹ It is less likely to occasion error, and is in accordance with the form annexed to the Heritable Securities Act of 1847,² already referred to. The origin of this stipulation appears to have been the prohibition to exact interest, or usury, for the loan of money; and in older practice the penalty was of large amount, in order to give the opportunity of taking out of it a full equivalent for interest. The clause has been retained, along with the obligation to pay interest; but, in a personal bond, it is now perfectly understood to cover only the expenses or 'necessary charges' to which the creditor is put in recovering his debt. The amount of the penalty stipulated in bonds was, in earlier practice, far from uniform. But the Act 1672, cap. 19, which introduced the process of adjudication instead of the apprising of the land in payment of debt, appointed the adjudication in favour of the creditor of such part of his debtor's lands as should be worth the amount of the debt, principal and interest, then resting, and a fifth part more in respect the creditor was obliged to take land for his money. After this Act was passed, the framers of bonds adopted the same proportion, and the stipulation for a fifth part of the debt, in name of liquidate penalty, has long been matter of fixed and uniform style. The amount, or rate, of the penalty, however, ought to be specified. In an early case, where a bond stipulated for payment of the principal sum, 'with interest and penalty,' the Court, in a process of adjudication against the debtor, refused to authorize the specification of a fifth or a sixth part more of the debt as the penalty. At the same time, they thought the writer of the bond was culpable and

¹ Style Book, ii. 25.

² 10 & 11 Vict. c. 50.

censurable for so gross an omission.¹ The penalty is not available to cover the expenses of a process at the creditor's instance against the debtor, for payment of the bond, in which, by decret *in foro*, expenses have not been found due to the creditor. The Court, by *not* decerning for expenses of process, have indicated that the debtor is not to be held liable therefor. In these circumstances, the penalty will cover only the necessary charges of making the decret effectual, but *not* those of the process itself; and it will make no difference in regard to this matter that the Court shall have expressly decerned for payment of the principal sum, 'with a fifth part more of penalty,' in terms of the bond.² But such a decret, if in absence, and not *in foro*, would apparently cover the expenses of the process. The Court here have not had an opportunity of indicating any opinion against the creditor's claim to such expenses; and, as a general rule, the creditor is entitled to be indemnified out of the debtor's estate for all the expenses he has been necessarily put to in making his debt effectual. On the same principle, when the process at the instance of the creditor is not with the debtor, but with a third party, and has for its object the support or defence of the bond and security thereby granted, the penalty will cover the expenses of such process, though no expenses have been found due to the creditor by such third party in the process with him.³

The obligation and security for penalty under a heritable bond are further available to a cautioner of the debtor paying the debt to the creditor, upon assignation from him, for enabling the cautioner to recover the expense of the assignation;⁴ and the heritable security for the penalty is available to the cautioner for enabling him to recover interest on the amount of interest advanced by him under his cautionary obligation.

INTEREST.

The next particular in the clause under consideration is the obligation to pay interest on the sum in the bond. It was common during the subsistence of the usury laws to stipulate for the 'legal interest' of the principal sum; which, after the passing of the Act 12 Anne, cap. 16, meant five per cent. per annum; but, since the usury laws were abolished by 17 & 18 Vict. cap. 90, the rate of interest is arbitrary. Apparently the term 'legal interest' would be held to mean five per cent., when there is nothing to the contrary in the deed. But the rate agreed on may be more or less than five per cent.; and, even if it is not so, it would betray want of attention not to specify it. What the stipulated rate ought to be, will depend on the circumstances of the transaction. In bonds for loans from private parties, a higher rate than five per cent. is almost unknown; and in such bonds it seems advisable to specify that rate, qualifying the obligation, according to agreement, by a probative letter, expressing that so long as the interest is regularly paid,

¹ Leslie, 6th Jan. 1705, M. 7429.

² Gordon, 27th Nov. 1761, M. 10,050;
see also Young, 21st May 1796, M. 10,053.

³ Allardes, 19th June 1788, M. 10,052;

Ramsay, 22d June 1826, 4 Sh. 737.

⁴ Inglis, 23d June 1825, 4 Sh. 113.

termly as it falls due, or within a certain number of days after each term-day, it shall not be lawful to the creditor to exact more than the lower rate agreed on ; but without prejudice to his right to exact the full stipulated rate of five per cent. in case of not punctual payment of the lower rate within the foresaid space after each term-day. The arrangement can be altered by the parties from time to time ; or, if they cannot agree as to an alteration of the rate of interest, it can be brought to an end at any term of Whitsunday or Martinmas, by a requisition of payment, which ought to be given not less than three months before the term when payment of the principal is wanted. Strictly speaking, requisition of payment, in the case of a past due personal bond, can be given at any time and without reference to any term ; but, in dealing with permanent loans, to and from private individuals, it is not usual to make any change of arrangements without requisition as above.

In bonds to banks, trading companies, or the like, the rate of interest is liable to greater fluctuation, occasionally rising much above five per cent. In these cases, the rate is sometimes described in the bond, by reference to notices to be printed and hung up in the office of the bank ; or to advertisements in the newspapers. In other cases, the form has been adopted of specifying the rate of ten per cent., on the understanding expressed in a probative letter, from or on behalf of the creditor, that the bank or company is to charge the current rate for the time on similar securities ; and this, I believe, is found to work perfectly well in practice.

In personal bonds, the interest may be made payable either generally, as in the form already given, which does not state that payment is to be made half-yearly, or at the two usual terms of Whitsunday and Martinmas, by equal portions ; in which last case the form contained in the schedule annexed to the Heritable Securities Act already referred to can be used. In earlier times it was not usual to levy the interest on personal bonds half-yearly. Such interest was uplifted yearly only ; and greater indulgence was allowed, even when the yearly term-day arrived, than is known in practice now. I was somewhat amused to fall in with a letter, written about the year 1786, to the creditor in a personal bond for £5000, reporting, as an arrangement apparently quite satisfactory, that the debtor was in future to pay his interest regularly, once every year, and not to be later with his money than six weeks after the term. Probably the specification in the bond of the half-yearly term-days marks the change of arrangement in this particular. But the specification is not required, in order to have the payments made half-yearly.

As a general rule, interest, though overdue, bears no interest in favour of the creditor.¹ But there are several exceptions to that rule, which I will notice here.

1. Where the interest overdue is judicially demanded in an action at law, the law of Scotland gives interest thereon. Such interest runs from

¹ M'Neill, 26th May 1826, 4 Sh. 620 ; as reversed, 22d Dec. 1830, 4 Wil. & Sh. 455.

the day on which the debtor, being judicially called on to pay, and who ought to pay upon citation, refuses or neglects to pay, and thereby becomes *in mord*.¹ The Lord Chancellor (Brougham) said in Goldie's case, 'The claim of the party is for two sums, the principal which was due, and the interest. The party refusing payment on the citation has put himself *in mord*, and is just as much liable to pay interest upon that (the interest) as upon the principal, or any other debt which one man owes another.' The same rule was followed in the later case of Maclean,² where the other authorities on the subject will be found quoted.

REGISTRATION
OF CHARGE.

2. When the creditor gives a charge for payment of his debt and interest thereon; and, within year and day after expiry of the charge, registers the messenger's execution of charge in the Register of Hornings, such registration has the effect of accumulating the debt, and the interest due at the date of the registration, into a capital sum, and of making the accumulated sum bear interest till paid.³ The same result followed under the Act 1621, cap. 20, when the creditor gave his debtor a charge for payment, and, on expiry of the charge, denounced him a rebel at the head burgh of the county of his domicile. In such case, the interest on the accumulated sum ran from the date of the denunciation. But the older forms, though not abolished, are now virtually superseded by the Personal Diligence Act. In the general case, a charge must be given, and followed up as above. But, where a threatened charge is suspended,—whereby an actual charge is rendered incompetent,—the creditor, if successful in the suspension, will be allowed the benefit of the accumulation of principal and interest into a capital sum bearing interest, as much as if he had given and followed up an actual charge.⁴

3. Accumulation of interest likewise takes place in an action of adjudication for the debt, terminating in a decret. The decret, which is just a judicial disposition, adjudges the debtor's lands to the creditor (redeemably conform to law) in payment of his debt, principal, interest to date of decret, and expenses; all which are accumulated in one sum in the decret, the accumulated sum expressly bearing interest.⁵

4. The decret of judicial sale in an action of ranking and sale of a bankrupt estate, or in an action of sale at the instance of an apparent heir, has practically the effect of accumulating interest with principal, as at the date when the price of the lands sold is payable, as far as the price will go in meeting the interest;⁶ because the price, when payable by the purchaser, is applicable in extinction of the interest due, as well as of the principal sum. The price is, in fact, set apart to the creditor, to the extent of the sums, principal and interest, due to him; and bears interest in his favour, which is the same thing as making the interest due to him on his debt bear interest.

¹ Jolly, 28th May 1829, 7 Sh. 666; and Goldie, 21st Jan. 1830, 8 Sh. 357; affirmed, 3d Oct. 1831, 5 Wil. & Sh. 745.

² Maclean, 15th February 1856, 18 D. 609.

³ Personal Diligence Act, 1 & 2 Vict. c. 114, s. 5, 10.

⁴ Findlay, 10th Feb. 1849, 11 D. 569.

⁵ See Style Book, iii. 337.

⁶ 1 Bell's Comm. 651, 653.

5. Erskine¹ holds that the Act 1621, cap. 28, authorizes the taking of obligations in bonds for money lent, for payment not only of the principal sum, but also of the interest to the term of payment, making the whole sum of principal and interest then due to carry interest, from and after that term, till paid. In present practice, such a thing is not known; and bonds ought not now to be so framed. But accumulation of arrears of interest with the principal, into a capital sum which is to bear interest, is occasionally matter of voluntary arrangement, and is unobjectionable. The amount of the interest in such cases is in fact an addition to the original loan. In cases where this occurs, a bond of corroboration ought always to be granted for the accumulated amount of the principal and unpaid interest. But there can be no stipulation for periodical accumulation, or for compound interest. Such stipulation would be contrary to law. And there is no authority for claiming, under an ordinary bond or bill, the annual accumulation of interest in arrear, as we shall see can be done in the case of a cash-credit bond, or a banker's or factor's account; and, although there be relative litigation under an ordinary bond or bill, yet, if it is not vexatious, there is no authority for claiming 'rests,'—that is, periodical accumulations,—these being penal.²

6. Cautioners, as we have seen, are entitled to interest on advances made by them to discharge interest due by the principal debtor. The interest paid by the cautioner is just an advance of cash necessarily made by him for the principal debtor, on which, as on any other advance lawfully made by one for another, interest ought to run in favour of the party making the advance.³

7. In bank accounts, the interest is annually accumulated in the ordinary course of business, and the obligation in a cash-credit bond to a bank, for payment of interest, covers interest calculated on this principle.⁴ On the other hand, the interest, when so stated and accumulated, becomes a principal sum, bearing interest from the date of the accumulation; and when two or more co-obligants, of whom one is principal, and the others really cautioners, are bound to a bank for a cash-credit to a fixed amount, with the interest to become due thereon, it is not competent for the bank, after having accumulated interest into capital, at the annual balance of the account, to remodel the account so as to make such accumulated interest not capital, but interest; at least, the bank cannot, by such proceeding, make a co-obligant liable in the stipulated amount of the credit, with interest from the date when the credit was fully drawn out. The co-obligant cannot be made liable for more than the fixed amount of the credit, with the interest thereon from the date of the last balance of the account preceding the date of the claim upon him.⁵

¹ Erskine, iii. 3. 81.

² Jolly's and Maclean's cases.

³ See Erskine, iii. 3. 78, and cases there cited.

⁴ Cruickshank, 26th Nov. 1834, 13 Sh. 91.

⁵ Reddie, 9th Jan. 1863, 1 Macph. 228.

LAW AGENTS.

On the same principle as in the case of bankers, law-agents acting as factors are bound to bring their accounts to a balance, and accumulate the interest thereon annually.¹ In Graham's case, a factor was made liable to pay interest, at four per cent., on the accumulated balance of principal and interest, arising on his accounts with a deceased brother, although he was not allowed any factor fee. In the case of Wellwood's Trustees,² the Court found that the factor for the trustees was liable to be charged with interest at the rate of four per cent. per annum, on all trust-moneys in his hands, from time to time; and that his accounts fell to be balanced annually, so that the yearly balance, on whichever side of the account it might be, might bear interest. Again, in the case of the Duke of Queensberry's Executors,³ the general rule, that factors' accounts should be brought to a balance, and the interest accumulated annually, was laid down. In that case, moreover, the factor was indebted to his constituent in a principal sum on heritable bond. He was entitled to retain such principal sum till he should be relieved of an obligation of warrandice undertaken for his constituent; but he was held bound to pay interest on the interest arising under the heritable bond, and to accumulate such interests annually.

TUTORS AND CURATORS.

8. Tutors and curators are bound to accumulate and pay interest on interest. The decisions heretofore pronounced vary as to the periods at which accumulation shall take place, and the rates of interest.⁴

Factors *loco tutoris*, factors *loco absentis*, tutors-at-law, and tutors-dative are now subject to the provisions of the Pupils Protection Act,⁵ which, by sect. 4, appoints the annual rendering of accounts; by sect. 5, orders the money in hand to be lodged in bank; and imposes a penalty of twenty per cent. per annum on retaining more than £50 in hand for more than ten days; and, if not retained from innocent causes, appoints the factor, or tutor, or curator to be dismissed, and to have no claim for commission. The Court has no power to modify this penal interest.⁶ The Act does not reach testamentary tutors, or curators, or trustees, or their factors. But it can hardly be doubted that such parties would now be held bound to make up accounts annually; and, apart from any specialities, to pay interest on the accumulated balances at five per cent. The Lord President McNeill, in delivering his opinion in the case of Wellwood's Trustees, before referred to, expressly said,—that the factor (who was one of the trustees) ought to be charged at 'the highest legal rate' of interest. The other Judges are stated to have concurred; and unless Graham's case, before cited, was held as forming a precedent which ought to be followed, it does not appear on what ground the interlocutor of the Court, in Wellwood's case, decerned for four per cent. only.

¹ Graham, 14th Jan. 1824, 2 Sh. 606.

² Wellwood's Trustees, 17th Dec. 1856, 19 D. 187.

³ Duke of Queensberry's Executors, 21st Dec. 1826, 5 Sh. 180.

⁴ See Hamilton, 25th Feb. 1813, F. C.; and Lady Montgomerie, 4th June 1822, 1 Sh. 453.

⁵ 12 & 13 Vict. c. 51.

⁶ Ballingal, 3d June 1853, 15 D. 711.

The interest on money, lent on personal bond, runs *de die in diem*; and the form of bond above proposed is expressed accordingly, saying, 'daily, monthly, yearly, and continually,' till payment; but, though it is right to use these or similar words, the law would give interest down to the day of payment of the principal, unless there was something in the bond, or other document of debt, to show that the parties did not intend interest to be payable.¹

The consent to registration for preservation, and if necessary for execution, follows the obligation for payment, and ought to be in the short form authorized by the Titles to Land Act of 1860.² This authorizes summary and all other necessary execution upon six days' charge. If the short form is not employed, it will be recollected that the days of charge, under a personal bond, ought to be six. This number ought in such cases to be specified, otherwise the execution, in virtue of the registered bond and warrant thereon, will be on fifteen days, if the debtor is in Scotland, and not in Orkney or Shetland, and forty days if in Orkney or Shetland. If, however, letters of horning in the old form are resorted to (as is still competent), the execution, in the above cases, will be (where six days are not specified) fourteen and twenty-one days respectively. If the debtor is furth of Scotland, the execution, whether on the warrant annexed to the extract bond, or on separate letters of horning, will be on twenty-one days' charge.³

The bond concludes with a testing-clause in usual form.

CHAPTER II.

WE shall now consider some varieties in the form of personal bonds, taking (1.) the case of such bonds by two or more obligants.

Where two or more parties undertake an obligation as principals (otherwise than by bill or note) for payment of a sum of money, or for anything else which is divisible in its nature, and, even when the principal subject of the obligation is indivisible in its nature, if there be an alternative obligation, to take effect in case the principal obligation be not fulfilled, and if such alternative obligation be divisible,—in all these cases the general rule of law is, that the parties are liable respectively *pro ratâ parte* only, according to their number, and not each *in solidum*; and bonds for money lent, granted by two or more principal obligants, simply binding themselves and their heirs, etc., would impose liability on each only for his rateable proportion.

¹ 1 Bell's Comm. 558; Cunninghame, 13th Dec. 1821, 1 Sh. 212.

² 23 & 24 Vict. c. 143, s. 30.

³ See the Court of Session Act, 13 & 14 Vict. c. 36, s. 21.

BONDS BY TWO
OR MORE OBLI-
GANTS.

JOINT AND
SEVERAL
OBLIGATIONS.

The rule of construction is the same, although the parties shall bind themselves 'jointly' or 'conjunctly.' In such case, each is liable only *pro rata*. Professor Bell¹ has indeed affirmed that the word 'conjunctly' imports an obligation *in solidum*, and not *pro rata* only; but the authorities he quotes do not appear sufficient to bear out that view; and Mr. Duff's opinion,² that the word 'conjunctly' imports only an obligation *pro rata*, appears more correct. In general, however, when bonds are granted by two or more parties, it is intended that each co-obligant shall be liable to the creditor for payment of the whole debt. It is usual, for that purpose, to make the parties bind themselves 'jointly and severally;' and whatever may be the legal import of the word 'conjunctly' by itself, it would be a grave error in a conveyancer were he, in framing an obligation intended to bind each of two or more persons *in solidum*, to omit to take them bound 'conjunctly and severally.' This last word, 'severally,' clearly and beyond all doubt subjects each in liability, *in solidum*, or for the whole debt. The introduction of the word 'severally' has the same effect as if each obligant had granted a several or separate bond to the creditor for the whole debt. And each of several obligants so bound can be sued for payment or fulfilment of the whole, without calling the others.³ The result is the same if the parties are all bound 'as full debtors,' or as 'co-principals and full debtors;'⁴ also, if the terms of the obligation are such as to import a copartnership between the co-obligants,—as copartnership of itself implies joint and several liability.⁵ Even a joint purchase for common behoof renders the purchasers severally liable for the price, and the joint obligation to grant bills as guarantees for purchases to be made.⁶ Also, decreet for expenses against the joint pursuers of a process, proceeding on the same ground of action, and with the same conclusion, infers several liability for the whole expenses.⁷

SUBJECT-
MATTER
INDIVISIBLE.

The liability is necessarily the same, if the subject-matter of the obligation be indivisible.⁸ But if the subject be divisible,—for example, an obligation for the delivery of wines or other fungibles,—the obligation is on the same footing as one for payment of a sum of money. Joint and several liability, however, will be involved, even where the non-performance of a fact results in a claim of pecuniary damages, if such result is brought about by the mere operation of law.⁹ The mere resolving into a claim of damages does not convert the obligation *in solidum* into an obligation *pro rata*. On the other hand, if the money claim arises under the bond, and as the stipulated alternative to the obligation to perform the fact, the liability for the money will be divisible among the parties *pro rata*.¹⁰ The intention of the parties, however, as to their re-

¹ 1 Bell's Comm. 345.² Duff's Treatise on Deeds chiefly affecting Moveables, p. 20.³ Richmond, 8th Feb. 1847, 9 D. 633.⁴ Dunbar, July 1665, M. 3584; Cleg-horn, 26th Dec. 1707, M. 14,624.⁵ Muahet, 16th Dec. 1710, M. 14,636.⁶ M'Laud, 20th Dec. 1665, M. 2282.⁷ Sutherland, 24th Feb. 1776, 5 Br. Sup. 439.⁸ Grott, 14th June 1672, M. 14,631; and Dickson, 24th Nov. 1697, M. 14,632.⁹ Darlington, 6th Dec. 1836, 15 Sh. 197, Lord Moncreiff's Note.¹⁰ Erskine, iii. 3. 74; Denniston, 16th July 1669, M. 14,630.

spective liabilities, may, if proved by their oath, authorize a claim for more than the words of the obligation would ordinarily impose.¹ A letter, engaging to bind 'conjunctly' with another for the price of sheep to be purchased, was held to mean that the party would engage for the whole debt.² Lord Elchies says,³ 'Unanimously we held him liable *in solidum*, 'which is the common acceptation among the commons of the word *conjunctly*.' There is, on the other hand, the instance of an obligation by two parties conjunctly and severally, with this addition, 'ilk one for his own part,' which last words were held to qualify the preceding words, and make each liable *pro rata* only;⁴ and in a case not altogether free of specialties, where each of two parties separately gave a letter, saying, 'I hereby become bound to you, along with A. B., to guarantee to you to the extent of £800,'—the obligation was held joint, and not several, and to bind each only for the half, in like manner as if the two had in one letter bound themselves jointly for the sum in question.⁵

An obligation by two parties, which in its terms imports, though it does not express, that one is the principal, and the other cautioner, renders the one as principal, and the other as cautioner, liable for the whole debt, without the quality of 'conjunctly and severally' in the bond.⁶ And two or more principal debtors who are bound conjointly and severally to the creditors, are bound in like manner, in relief of one who has bound himself as their cautioner, although the co-principals were not expressly obliged in the bond to relieve him conjunctly and severally, but only to 'relieve him in general;' because 'the co-principals being bound to the original creditor, conjunctly and severally, were also bound so to the cautioner, who interposed conjunctly and severally for them; and who, by payment, taking an assignation from the creditor for his own relief, came in place of the creditor.'⁷

Tutors and curators also are jointly and severally liable to the pupil or minor (unless their liability is limited by the deed of their appointment).

The joint and several liability, however, when undertaken, is intended for the benefit of the creditor, and not with the view of altering or affecting the rights and liabilities of the obligants respectively, *inter se*; and accordingly, if any one of them is required to pay more than his rateable proportion of the debt, he has right of relief, or recourse by law, against his co-obligants for the excess of his payment beyond his proper share.⁸ The joint and several liability of the obligants, however, operates in questions *inter se* to this effect, that, if one or more of them shall become insolvent, the deficiency arising through his or their insolvency falls upon the others, increasing their rateable proportions

¹ See Campbell, 25th Nov. 1724, M. 14,626.

² Sloan, 5th Feb. 1751, M. 14,630.

³ Elchies, *voce Solidum et pro rata*, No. 1, Notes, 431.

⁴ Farquhar, 28th July 1638, M. 2282.

⁵ Alexander, 28th Nov. 1827, 6 Sh. 150.

⁶ Grant, 6th July 1721, M. 14,633, 14,637.

⁷ Buchanan, June 1713, M. 14,661.

⁸ Carswell, 15th Jan. 1850, 12 D. 462.

respectively of the debt. And the right of relief or recourse, on the part of the solvent obligants, *inter se*, becomes operative as above with reference to the increased proportions.¹ This right of relief or recourse arises by law on payment of the debt; and it is not necessary, in order to operate recourse, that the obligant paying shall obtain an assignation of the debt from the creditor.²

In general, when two or more individuals join in a personal bond, one is proper debtor, and the others only his cautioners; but it is usual, notwithstanding, to frame the bond just as if all were proper debtors, and in the same situation as regards the loan. It is sometimes objected to that form, that it states what is contrary to the fact,—in making the whole parties acknowledge that they had borrowed and received the amount of the loan; whereas, in truth, only one of them was so to borrow and receive, though all were to undertake for repayment. In order to meet that objection, the bond can make the actual borrower only grant the acknowledgment of the receipt of the loan, though all the parties will bind themselves jointly and severally for repayment. This will constitute a good obligation on each and all of the parties, care being of course taken to get all of the parties to subscribe. The fatal effect of omitting to obtain the subscription of any one or more of the obligants named, in a bond so framed, is shown in the case of Paterson,³ to be afterwards referred to more particularly.

CO-OBLIGANTS
FOR PAYMENT
OF INTEREST.

When two or more obligants grant a bond, one being proper debtor, and the others cautioners only, it is proper for the cautioners to obtain from the principal debtor either a formal bond of relief, or a probative acknowledgment that the debt, though *ex facie* due by both or all the parties, is truly due by the granter of the acknowledgment only, and an obligation by him to relieve the other or others as accords. Co-obligants sometimes engage for payment of interest only; in which case, the bond, after an introductory or narrative clause and obligation on the part of the proper debtor to pay the principal sum, and corresponding penalty in case of failure, will proceed thus: 'And I, the said A,' (that is the proper debtor), and 'I, C,' (that is the co-obligant for the interest), hereby bind ourselves, jointly and severally, and our heirs, executors, and representatives whomsoever, without the necessity of discussing them in their order, to pay to the said B. or his foresaids the interest,' etc., as in the form applicable to bonds by two parties. When the obligation for interest is not incorporated in the bond, it will narrate the bond, and that, in the treaty for the loan, it was stipulated and agreed that the co-obligant should become bound for payment of the interest. The obligation will then, without prejudice to the bond for the principal and interest, but in corroboration thereof, bind the co-obligant, his heirs, etc., without the necessity of discussion, to pay the interest, in terms corresponding to those of the obligation for

¹ Finlayson, 20th Dec. 1827, 6 Sh. 264.

² Craigie, 21st Dec. 1710, M. 14,649.

³ Paterson, 9th March 1844, 6 D. 987.

interest in the principal bond, and will close with consent to registration, and testing-clause in common form; the *inducie* of execution, if expressed, being six days.

The granter of a collateral obligation for payment of interest is sometimes made to renounce not only the benefit of discussion, as regards his own heirs, but also the benefit of discussion of the granter of the principal bond; but this last provision should not be introduced. The obligation is not legally that of a cautioner, but of a principal, who never had right to require the discussion of the co-principal obligant; and by the Mercantile Law Amendment Act,¹ even cautioners, in obligations granted after that Act came into operation, have no longer the benefit of discussion, unless they specially stipulate for it in their bond.

What I have said before as to preserving evidence of cautionry, in the case of a bond by two or more parties as *ex facie* co-principals, is equally applicable to this case; and it may be well to offer a word of warning here against the insidious character of cautionary obligations for payment of interest on borrowed money. They are often asked of law-agents, and other parties, and are represented and supposed to be comparatively light and little onerous, and so they are undertaken without much consideration. But there is no greater mistake. Professor Bell says,² 'This looks like an obligation for the interest only; but, if the subject of the security fail, it seems to result in an obligation for the principal sum, or an annuity redeemable by payment of that sum, and must be ruled by the same principles which regulate annuities.' On this point, he refers to the case of Fairholm's creditors (but without noticing any report of it), in which the Court of Session gave judgment against collateral obligants bound for interest only, decerning for payment of the principal sum. The case, he says, was appealed, and remitted on a specialty, and compromised. But any one who is bound to pay the interest of a debt is substantially bound for the debt, whether the principal can be exacted from him or not. It is the same thing, in general, whether a party is bound to pay £1000 of capital or an annuity of £50 for ever.

When the rate of interest is to rise and fall with the market-rate on similar bonds, the arrangement to that effect will be expressed, as already suggested, in a separate probative letter, from the creditor to the debtor; but if there is to be a fixed rate of interest for a term of years certain, as is sometimes agreed on, there is no objection to the insertion of a condition to that effect in the bond; a form for which will be found in the last edition of the Juridical Society's Styles.³

(2.) The next variety which I notice, in the form of personal bond, is that of a bond granted to one in liferent, and another, and his heirs, executors, or assignees, in fee. In such cases, whilst the liferent subsists, the liferenter and fiar must concur in calling up the debt, and in granting a discharge or assignation on payment; and the money, when paid,

BOND TO ONE
IN LIFERENT.
AND ANOTHER
IN FEE.

¹ 19 & 20 Vict. c. 60, s. 8.

² 1 Bell's Comm. 347.

³ Style Book, i. 600.

requires to be placed in deposit, or otherwise kept by itself, for behoof of the parties, according to their respective rights. All this involves arrangement, which may in some cases be matter of difficulty; and, wherever money is to be lent for behoof of liferenter and fiar, the intervention of trustees for behoof of the parties, according to their interests, will be found convenient. A trust-deed is not essential for this purpose. It is enough to take the bond to the trustees, in trust for behoof of the parties in liferent and fee respectively; and to declare that the trustees shall be entitled and bound to hold for behoof of the parties, during the subsistence of the liferent; and shall be bound, on the lapse thereof, and on being duly discharged and reimbursed, or relieved of expenses, to denude in favour of the fiar. The bond will also contain the usual clauses of indemnity in favour of the trustees, and of the debtor, assignees, and others transacting with the trustees, declaring the trustees not liable for omissions or for one another, but only to act honourably, and account for actual and personal intromissions; and declaring assignees and others transacting with the trustees not concerned with the purposes of the trust. Of this you will find a suitable form in the volume of the Juridical Society's Style Book, already referred to.¹

**BOND TO
TRUSTEES.**

(3.) Where bonds are granted to trustees, in trusts formally constituted, the narrative clause will contain an acknowledgment of the receipt of the money from the lenders, as trustees of the truster, acting under a deed or deeds, which will be shortly specified and described; the loan will be acknowledged expressly as made 'out of the trust-funds under their management as trustees foresaid;' and the obligatory clause, binding the borrower in repayment, will be conceived in favour of the trustees in trust, in accordance with, and for the purposes of, the trust-deed or deeds, and their assignees, and will contain the declarations or clauses of indemnity before referred to, for the security of the debtor, assignees, and others, and which in this, and the case immediately before referred to, will be inserted at the end of the obligation, and before the consent to registration.

TO BANKS, ETC.

(4.) Where bonds are granted to incorporated banks, or public companies, or trusts, the description of the creditors, and the obligatory clause pointing out to whom the money is to be payable, and by whom discharges or assignations are to be granted, will be regulated, in the case of companies incorporated under the provisions of public Acts, agreeably to these Acts; in the case of companies incorporated by special Act of Parliament, or Royal Charter, or Letters-Patent, by the provisions of such Act, Charter, or Patent; or by the use and wont, if the deed of constitution is silent as to the name in which the property of the corporation is to be held. Thus bonds for money lent by the Royal Bank of Scotland are conceived in favour of 'The Royal Bank of Scotland,' and the assignees of the bank. In such cases the Act, or other

¹ Style Book, 4th edition, i. p. 600.

instrument of constitution, must be strictly adhered to. The incorporation is the creature of the instrument of constitution, and can do nothing disconform to its provisions. When the company is unincorporated, it is sufficient to make a personal bond for money lent or due, payable to the company, *socio nomine*, and their assignees. But it is more usual to make the bond in such cases payable to the whole, or some of the partners individually, and the survivors and survivor of them, in trust, for behoof of the company and partners thereof, according to their interests, and to the assignees of the trustees, and of the survivors or survivor of them.

CHAPTER III.

BONDS in favour of banks or merchants are frequently granted, not for a present advance in loan, but with a view to cover the operations upon a cash-account or account-current, to be kept in the books of the bank or mercantile company; out of and into which account money is to be drawn and paid, in the ordinary course of trade. These are technically termed 'Cash-credit Bonds.' When merely personal, they are never granted by individuals singly; but they are of common occurrence on the part of trading companies, or of two or more joint and several obligants. Banks look usually for two co-obligants, in addition to their real customer; making three parties in all, each liable to the bank for the whole debt. CASH CREDIT BONDS.

The bonds proceed on the narrative that the directors (or other office-bearers) of the bank have agreed to allow the obligants credit to a specified amount, on a current cash-account to be kept in the books of the bank, at a particular office or place, in the name of some one of the obligants particularly specified, or of the company; and to be operated on by the person so pointed out, or by the company, all as the case may be; and the obligants bind themselves to pay on demand, at any time after a certain number of months from the date of the bond, to the bank, or to trustees for the bank, their assignees, etc. (in the form prescribed by the bank's Act of Parliament or charter of incorporation, or other deed of constitution), the sum of the credit, or such part or parts thereof as shall at any time be due upon the cash-account, and that within the office or place of business of the bank (or other place specified), with penalty in usual form, and interest on the sum of the credit, or such part or parts thereof as shall be due for the time, at a specified rate per annum, from the time of advance until repayment. And what I have said with reference to the rate of interest to be stated in bonds to banks for fixed loans, is equally applicable to the case of cash-credit bonds.

The transaction being one not of permanent loan, to bear interest from term to term, but of banking, in which the interest will be charged to the account at the annual balance, there will, of course, be no stipulation for payment of half-yearly interest, as in ordinary loan transactions.

The obligatory clause will be followed by a declaration that the sums to be placed to the debit of the account shall include not only all sums of money which shall be advanced by the bank to the party by whom the account is to be operated on, but also all other advances of every kind which the bank, at any time, shall make, or become responsible for, to such party, or on his account, or on his credit, and, generally, all sums which the party shall, at any time, be owing, or in any manner of way liable for, to the bank. The bank will be declared entitled, at any time, to place the amount of all such debts and liabilities to the debit of the cash-account, but without prejudice to any other securities held by the bank for such debts and liabilities, or any of them; and it will be declared optional to the bank to charge the same to the cash-account or not, as the directors of the bank, or other office-bearers, shall think fit.

MODE OF
ASCERTAINING
BALANCE.

The cash-credit bond is truly an obligation for payment of the balance due on an account-current. It is therefore necessary, with a view especially to execution by diligence against the granters, to have a special mode fixed, whereby the balance due shall be readily ascertained. This is done by stipulating that a certificate of the amount due on the account, under the hand of the cashier, or some other of the principal officers of the bank for the time being, shall be sufficient to constitute and ascertain the balance due by the parties under the bond, to which there is usually added a declaration that no suspension shall pass of a charge or threatened charge for payment of the balance so ascertained, except on consignment of the sum sought to be suspended. There may obviously be much convenience to a bank in being enabled, in their option, to place to the cash-account all sums for which the party operating on it is indebted to them. Such sums, if so dealt with, immediately fall under the obligations of the bond, and will be included in the certificate or account liquidating or ascertaining the balance due for the time; and, in virtue of the bond and relative certificate or account, the bank can use summary diligence for such sums against all or any of the obligants.

The certificate or account made up and authenticated in the terms prescribed by the bond does not require to be registered before resorting to diligence against the obligants. The bond is the ground of charge for the sum due by the account. The certificate or account fixes the amount of that sum for diligence or for ranking in a sequestration.¹ The declaration in the bond, however, that the certificate shall constitute and ascertain the balance, does not preclude scrutiny into the account.²

¹ Fisher, 11th Feb. 1824, 2 Sh. 695.

² Lord Alloway authorized such scrutiny in a case of the Bank of Scotland, decided

in the winter session 1818, noticed (but not named) in 1 Bell's Comm. 364, note 3; see also Smith, 25th June 1829, 7 Sh. 792.

And the declaration, that no suspension shall pass, except on consignation, is not an absolute bar to suspension on caution.¹ Professor Bell says,² in reference to Forrester's case, 'the case was very deliberately considered,' and the majority of the Court thought the clause an interference with the public law of the land; and he says the stipulation is not legitimate or effectual. Effect was again refused to this declaration in a subsequent case.³ The clause, notwithstanding, is universally retained in such bonds.

In such bonds, care must be taken to obtain the subscriptions of all the individuals named as parties. Where a cash-credit bond is granted to a bank, in name of two or more parties, the account, as I have said, is kept in the name of only one of them, and the bond, which narrates this arrangement, thereby shows that the others are truly cautioners, though they are not expressly described as such. In these circumstances, the parties, so shown to be cautioners, are entitled to the equities of a cautioner; because it appears clearly from the transaction, as set forth in the deed, that they are such, though, by subscribing as principal obligants, and the technical term 'cautioner' not being used, they have not the benefit of discussion, and other privileges conferred by law on cautioners. Thus, in a case where a cash-credit bond was granted to a bank, in name of five parties, but the account was to be kept in name of one of them only, four of the parties named as the granters signed; the fifth refused to do so when the bond was presented for his signature. No intimation of this fact was given to the other cautioners, one of whom, when charged to pay the whole debt, suspended. The bank pleaded that they had not undertaken to procure the signatures of all the parties; but the Court held that, in respect of the want of the subscription of the fifth obligant, named as a party, the whole of the cautioners were free of liability under the bond.⁴ A similar decision was pronounced in a later case,⁵ where the bond was for a capital sum, and in name of five obligants, one of whom was shown, on the face of the deed, to be the principal debtor. The company intrusted this party with obtaining the signature of the obligants, and he forged the signature of one of them. The others were held entitled to the equities of cautioners; and the Court were of opinion that, in the circumstances, the lenders had undertaken to procure the subscription of the co-obligants, and were liable for not having done so; they had, in fact, given the borrower control of the bond, and opportunity of committing the forgery.

In connexion, and, in some respects, in contrast with these decisions, the case of M'Donald⁶ requires attention. In that case a bond for a capital sum, granted in name of five co-obligants, and subscribed by only

SUBSCRIPTION
BY WHOLE CO-
OBLIGANTS.

¹ Forrester, 27th June 1815, F. C.

² 1 Bell's Comm. 364, note 4.

³ Gilmour, 8th July 1831, 9 Sh. 907.

⁴ Paterson, 9th March 1844, 6 D. 987.

⁵ Scottish Provincial Assurance Company, 28th Jan. 1858, 20 D. 465.

⁶ M'Donald, 5th July 1810, F. C.

four of them, was nevertheless held binding on the subscribers; the omission to procure the additional subscription not being attributable to any fault or collusion of the creditor. The Court there held that it was the duty of the obligants themselves to see that all parties signed. It does not appear from the report whether the bond showed one of the obligants to be principal, and the others cautionary obligants. It is simply said, that the bond was made out 'in the usual terms.' But after the decision in the cases of Paterson, and the Scottish Provincial Assurance Company, it would be unsafe to rely on any bond, in name of several obligants, without obtaining the subscriptions of them all. Neither is it just to those who do subscribe to omit obtaining the subscription of all the others, even if the bond would be good without such subscription. The Assurance Company's case will naturally suggest that care be taken to secure genuine subscriptions.

JUDICIAL
CAUTION.

The case of judicial cautionry, however, is different from that which we have been considering. In such a case, the finding of caution is a transaction between the suspender or debtor, and the cautioners, to which, strictly speaking, the charger or creditor is not a party. In fact, the caution is forced upon the charger by the Court against his will. Moreover, the bond of caution contains no clause to apprise the charger, that one of two or more cautioners stipulated for the signature of another as joint cautioner; and accordingly, though one of two cautioners in a suspension had not signed the bond of caution, and the suspender had forged his name to the bond, the other cautioner was still found liable to the charger under the bond, as it was no part of the charger's duty to see that both cautioners had signed; and, in fact, 'it is no part of the proceeding, that the charger should be brought into contact with the suspender, or the cautioner or cautioners whom the suspender may propose, and who may be accepted' by the Bill-Chamber Clerk.¹

DEATH OR
BANKRUPTCY OF
CO-OBLIGANTS.

It has repeatedly been questioned whether, notwithstanding the death of one or more or even all the co-obligants in a cash-credit bond, the bond remains in force against the heirs of the deceased, to the effect of their being liable for drafts, made after their predecessor's death. It appears also to have been questioned whether, after the bankruptcy of one or more co-obligants, the other parties remained liable for the future operations on the credit account. But it is never stipulated that, when any of the obligants dies or becomes bankrupt, notice is to be sent to the co-obligants or their representatives; neither is there any general usage to that effect. And it may be considered to be now deliberately settled that, as a general rule, the bond does remain operative. There is a consistent train of decisions to the above effect, of which, however, it is unnecessary to quote more than the last two.² On the faith of these decisions the business of banking has long been carried on, and the transactions depending on cash-credit bonds were referred to by the

¹ Simpson, 3d Feb. 1860, 22 D. 679.

British Linen Company, 12th Feb. 1858, 20

² Morrice, 19th Feb. 1831, 9 Sh. 480; D. 557.

Lord President M'Neill in the British Linen Company's case, as extending not to millions merely, but to billions. His Lordship therefore refused, in that case, to hold the question raised as in any degree open to discussion.

Hitherto we have been considering the case of a bond for a cash-credit by several individuals, and not by a company. When such bonds are granted by companies, there are one or two variations and additional clauses of importance.

BOND BY A
COMPANY.

1. The bond will run in the name of A., B., and C., the individual partners of the company carrying on business in (a place named), under the firm of A. & Co.; or it may be in the name of the company, *socio nomine*, with the addition of the individual partners; or even without such addition, though this last form is unusual, and would betray want of care. The narrative will be the same as in the case of a cash-credit bond by individuals, *mutatis mutandis*.

2. The parties will bind themselves, both as partners of the company, and as individuals, and their heirs, executors, and representatives whomsoever, without the necessity of discussing them in their order; and also the company and stock and profits thereof, all jointly and severally, to pay on demand, etc., as in the case of a bond by individuals.

3. The sum which the bank, in its option, may or may not place to the account, must of course be due by, or chargeable against, the company, not any of the partners individually.

4. The most important provision peculiar to this case is that which has reference to changes in the constitution of the company, by or for which the obligation is granted. These changes may take place by the death or retirement of partners; the expiry of the contract, and a new constitution, or the assumption of new partners; and, when there is no specialty in the case, the bond, if it has reference to the transactions of one particular company, and that only, will not cover advances made to any other company. The authorities on this point will be found in the case of *Christie*;¹ and we have now a special enactment in conformity with these authorities in the Mercantile Law Amendment Act for Scotland.²

When a change is known to take place in the company, by or for whom the bond is granted, it may often be advisable to cancel the old bond, and take a new one from the new company. But changes may take place without the bank being informed, particularly in the case of a new contract of copartnership, or the retiring of an old, or assumption of a new partner; and a bond applicable only to the operations of the old company, though it would not hurt the claim of the bank as ordinary creditors for the amount of their advances to the new company, would give them none of the benefits derived from holding a bond. It is well, therefore, to make the bond in such cases expressly applicable to the

CHANGE IN
COMPANY.

¹ *Christie*, 17th May 1839, 1 D. 745; affirmed 6th April 1841, 2 Robinson, 118.

² 19 & 20 Vict. c. 60, s. 7.

operations of the new, as well as of the original company ; for which purpose a provision should be adopted, similar to that contained in the form of a bond and disposition in security of a cash-credit, given in the last edition of the Juridical Styles,¹ the variations requisite, as applicable to the case of a personal bond, being of course attended to. That clause makes the obligations of the bond applicable to all transactions of the new, as well as of the original company, providing always—(1.) That the copartnership-name, or firm, continues the same ; (2.) That the new company carries on business at the same place as the old ; and (3.) That one or more of the partners of the old are partners in the new company. These qualifications appear essential, as applicable to the extension of the obligation to the transactions of the new company. When it is intended to provide for changes in the constitution of the company to whom the bond is granted, the bond should be taken to trustees for the existing company of, say A. & Co., and the partners thereof, and any other company of A. & Co. existing for the time, and carrying on business at the same place, and of which one or more of the present partners of the existing company shall be a partner or partners. These, you will observe, are the same as the provisions recommended as relative to the bond by or for a company. In such a case the partners of the existing company will generally be the trustees. But the bond should, notwithstanding, contain the usual clause of indemnity applicable to bonds to trustees, for protecting the debtor and others from any concern with the application of the contents of the bond when paid, and the trustees from liability for omissions, etc. These provisions will meet the difficulty in the case of a personal bond, bringing it clearly within the scope of the provision of the Mercantile Law Amendment Act of 1856, above quoted, which specially protects guarantees, etc., where the intention of the parties that the same shall continue to be binding, notwithstanding the change of partnership, shall appear, either by express stipulation, or by necessary implication from the nature of the firm, or otherwise. The provisions now suggested are applicable to formal bonds for cash-credits. In an ordinary letter of guarantee, even where there is a series of transactions to be provided for, it would generally be enough for all practical purposes to say, in the words of the Act, that the same should continue to be binding, notwithstanding any change of the partners composing the company by whom the guarantee was granted on the one side, or to whom the guarantee was granted on the other side, or on both sides.

I have noticed that the partners of a company ought to bind themselves, both as partners and as individuals, which is the usual style. But where the cash-credit is in favour of a company, and where not only the company, but each partner individually, subscribes the bond or letter of guarantee, the partners are liable not only as such, but also as individuals, without express words to that effect in the bond.² And, if the

¹ Style Book, i. 621.

² Melliss, 22d June 1815, F. C.

bond is payable to the cashier or other officer of a bank by name, diligence on the bond is competent at the instance of the person named.¹

Bonds of annuity may be granted in consideration of a price paid down, or for love and favour, or, generally, for good and sufficient causes and considerations. When a price is paid, the amount must be specially set forth, in compliance with the provisions of the Stamp Acts. The receipt of it will be acknowledged and discharged, and in all cases the obligant will bind himself and his heirs, in usual form, to pay to the annuitant the amount of the annuity, at such terms or days as may be arranged, during the lifetime of the annuitant, or for such length of time as may be agreed on, with penalty in case of failure, and interest, as usual in regard to money obligations. BONDS OF ANNUITY.

In framing such bonds, care should be taken to express whether the annuity is payable forehand, which will usually be the case where it is of an alimentary nature, or on the same footing as the interest of money or rents of land, that is, for each term, at the expiry of the term. In the latter case, if the annuity is for life, and if it is intended that, on the death of the annuitant between terms, a proportion of the annuity, corresponding to the period from the preceding term, to the day of the death, shall not be exigible, a provision to that effect will have to be inserted, otherwise such proportion will be payable, in virtue of the Apportionment Act,² which Act extends to Scotland.³

In case the annuity is to be redeemable, the intimation of the intended redemption, when the annuitant is furth of Scotland, will be given at the office of the Keeper of Edictal Citations, according to the mode established by the Act 6 Geo. IV. cap. 120, sect. 51, and by relative Act of Sederunt, 24th December 1838. This is settled by the Act 13 & 14 Vict. cap. 36, sect. 22. The intimation will not be at the market-cross of Edinburgh, and pier and shore of Leith. For giving this intimation letters of supplement under the Signet will be required. Transactions for redeemable annuities were formerly gone into chiefly in order to secure to the lender of money more than the then legal rate of five per cent. interest. He gave up his power to call for payment of the principal sum, which in general he could not recover otherwise than through an assurance on the debtor's life; all this required an annuity at a high rate, besides that the risk was necessarily incurred of forfeiting the policy on the debtor's life. There being now no restriction on the rate of interest chargeable on a loan, an annuity transaction is not necessary for securing the above object. It may still, in certain circumstances, be desired to exclude the lender's right to call up the principal sum during the debtor's lifetime. But such object would be fully met by a bond for a principal sum, pay-

¹ Fisher, 7th Dec. 1827, 6 Sh. 162.

² 4 & 5 Will. IV. c. 22, s. 1.

³ Bridges, 7th March 1844, 6 D. 968; affirmed 23d Feb. 1847, 6 Bell's App. 1.

able at the first term of Whitsunday or Martinmas after the grantor's death, or earlier, in his option, if so arranged. The rate of interest will then be according to the agreement of the parties. The debtor can thus relieve himself at any time by payment; and, assuming that the security for the amount of the debt is otherwise adequate, the creditor needs no life assurance to secure the return of his capital; nor (in such case) is he concerned with the risks attending an assurance on the debtor's life.

In questions *inter hæredes*, irredeemable bonds of annuity, though personal, affect primarily the heirs in heritable estate, in the order of liability before explained; and the executors, or heirs in personal estate, *subsidiarie* only, because they have reference to a tract of future time, and are not, like personal bonds for capital sums, open to be called up or paid off at once. I do not find any authority as to the liability of heirs and executors respectively, when the annuity is redeemable. I think that if constituted by simple personal bond, without security of any kind, the annuity would affect the heir in heritage equally with irredeemable annuities. But where security of any kind is given, either for irredeemable or for redeemable annuities, such annuities will, in the first place, form burdens on the heir or executor having right to the subject of the security, as being the fund specially pointed out by the debtor, as primarily liable in payment.

Life annuities, payable under bonds or other deeds not falling under the operation of the Apportionment Act, would be dealt with on the same footing with the rents of lands, to this extent, that, if nothing were said to the contrary, the liability of the debtor for payment of the annuity would cease, as at the term preceding the annuitant's death.¹

Before leaving the subject of annuities, I wish to call your attention to an Act which annuls all bonds for life-annuities, the consideration for which shall not be in money, and the amount expressed actually paid, viz., 17 Geo. III. cap. 26. This Act appears not to extend to Scotland, but we are getting more and more in the way of dealing with English bonds and securities,—and you will find the defence of nullity, under this Act, pleaded in the Scotch case of Warburton.² The objection there was, that the bond of annuity was granted partly in payment of the price of pictures.

CHAPTER IV.

BONDS OF
CAUTION.

WE have now to consider proper Bonds of Caution.

1695, c. 5.

By our ancient law, cautionary obligations were subject to no limitation except the negative prescription of forty years, applicable to all bonds; and great injury and loss were suffered, as the Act 1695, cap. 5,

¹ Colebrooke, 14th May 1835, 13 Sh. 756.

² Warburton, 5th June 1823, 2 Sh. 365.

says, by 'men's facility to engage as cautioners for others, who, afterwards 'failing, have left a growing burden on their cautioners without relief.' With the professed object of remedying that great evil, the above Act was passed, providing that no person, binding himself for and with another, conjunctly and severally, in any bonds or contracts for sums of money, should be bound for the same longer than for seven years after the date of the bond; but that, after said seven years, he should be *eo ipso* free of his caution; and the Act declares, that whoever is bound for another, either as express cautioner, or as principal, or co-principal, should be understood to be a cautioner to have the benefit of the Act, provided he have either a clause of relief in the bond, or a bond of relief apart, intimated personally to the creditor at receiving of the bond, without prejudice to the true principals being bound in the whole contents of the bond or contract; and providing that what legal diligence by inhibition, horning, arrestment, adjudication, or any other way, should be done within the seven years by creditors against their cautioners, for what fell due in that time, should stand good, and have its course and effect after the expiry of the seven years, as if the Act had not been made.

This Act has not realized the object which it had in view, which was nothing less than to impose a legislative limit on the power and the will of friends to assist each other in one great department of social affairs. For, although the Act is fully operative according to its terms, its effect has been not to prevent individuals—acting upon motives which lie beyond the reach of legislation—from being cautioners for one another; but to make parties lending sums of money, on the security of a principal and cautioner, require an obligation so framed as not to be exposed to the limitation introduced by the Act;—that is to say, to require that the parties shall bind themselves jointly and severally, exactly as if they were co-principals. The Act, therefore, has made the situation of the cautioner in many instances worse, instead of better.

The proper bond of caution, after an introductory clause or narrative, FORM OF BOND. in the form of the ordinary bond, will proceed thus:—'Which sum I, 'the said A., as principal, and I, C., as cautioner, for and with the said A., 'bind ourselves, conjunctly and severally, and our heirs, executors, and 'representatives whomsoever, without the necessity of discussing the said 'heirs respectively in their order [I, the said C., and my foresaids, being 'bound only *subsidiarie*, and after discussion of the said A. and his fore- 'saids], to repay to the said B.' etc., in the form of the ordinary bond, down to the clause of registration; immediately before which there will be inserted the following obligation or clause of relief; viz,—'And I, 'the said A. (that is the principal), bind myself and my foresaids, to free 'and relieve, harmless and skaithless keep, the said C. (that is the 'cautioner), and his foresaids, of and from payment of all, or any part of 'the foresaid sums, principal, interest, and penalty, and all loss, damage, 'and expense which they may incur by his becoming cautioner for me in 'manner foresaid: And we consent,' etc.

This bond is for a sum of money instantly advanced, in consideration of the bond being granted ; the cautioner is expressly described in the bond as such ; he is bound conjunctly and severally with the principal debtor, and there is an express clause of relief. There can be no doubt, therefore, of the application of the Act of 1695, cap. 5, to such a case, assuming always that the term of payment is within seven years from the date of the bond. The bond, you will observe, makes the cautioner liable only *subsidiarie*, and after discussion of the principal debtor. This clause will be inserted, or not, according to the agreement of parties. Until 1856, the law itself gave the cautioner the right to require discussion of the principal debtor. The operation of that right, and the general principles applicable to discussion, have been already considered in connexion with the order of the liability of the heirs in a deceased debtor's estate for payment of a personal debt. But, by the Mercantile Law Amendment Act,¹ the legal right to discussion, in the case of cautioners who shall become bound after the passing of that Act, is taken away ; parties having still right to make such discussion matter of express stipulation, if they think fit.

SEPTENNIAL
LIMITATION.

The Act 1695, cap. 5, is liable to be strictly interpreted.² This is, no doubt, because it introduces a limitation of the liability of obligants and corresponding rights of creditors ; but the report of Blair's case is silent as to the grounds of the decision. But where two persons were bound conjunctly and severally in a bond, the one as principal and the other as cautioner, the cautioner was found to have the benefit of the septennial limitation, although there was neither clause of relief in the bond, nor a separate bond of relief intimated to the creditor at receiving the principal bond.³ The same was found in another case,⁴ the report of which does not bear that the parties were bound conjunctly and severally ; but no argument was founded on the want of these words, which, it may therefore be concluded, were not wanting. This, and other points, were brought before the House of Lords by appeal ; and, though it was found unnecessary to decide upon this question, Lord Eldon, in delivering his opinion, said it was now too late to go against the decision in Ross's case. In accordance with that view, several successive decisions to the same effect have been pronounced. The point of law may therefore be held as conclusively fixed ; but still it would not be good practice to omit the clause of relief, or fail to take a separate bond of relief, and intimate it, with due formality, to the creditor at his receiving the bond for his debt, in any case of proper cautionary obligation, in which it is intended to take the benefit of the Act.

Where the obligation of the cautioner is undertaken or renewed by bond of corroboration, the cautioner, though clearly and expressly such, and by law entitled to relief from the principal debtor, is not within the

¹ 19 & 20 Vict. c. 60, s. 8.

³ Ross, 11th Dec. 1729, M. 11,014.

² Blair, 20th Jan. 1747, M. 11,025.

⁴ Douglas, Heron, & Co., 20th Nov. 1792, M. 11,032.

Act.¹ The judgment in Scot's case is, 'The Lords found the Act did not comprehend an obligant in a bond of corroboration.' In Gordon's case, the Court are said to have expressed regret that the Act did not extend to corroborative securities, as the reason of the thing would seem to be the same. But they thought themselves not at liberty to find that it did extend to corroborations, in respect of the words of the Act declaring the limitation to run from the date of the bond. The principle appears to be, that the cautioner, in order to have the benefit of the Act, must be bound from the date of the contract for the advance, which the cautioner, in a bond of corroboration, is not.² And where the obligation, in which the cautioner joined, was one by the partner of a company in favour of copartners retiring from the concern, to relieve them generally of all the debts owing by the company, the Act was found not to apply, though the obligant was expressly named cautioner.³ Properly speaking, this is not a bond or contract for a sum of money actually due at its date. For this reason, the Act would apparently not apply to a bond with an express cautioner for sums to become due upon a cash-credit. In Alexander's case, Lord Fullerton said that the Act had been found not to reach the cautioner for an annuity, even as to that portion payable before the seven years elapsed. The decision is not cited, but the reason is obviously the same as in regard to a cash-credit obligation, and the case even stronger. For the same reason, the Act does not reach the cautioner in an obligation *ad factum præstandum*.⁴ And where the bond of caution is executed in a foreign country, between parties domiciled abroad, and with reference to foreign transactions, the Act is equally inapplicable, though the parties who were actually pursued under the bond were under the jurisdiction of the Scotch Courts.⁵ The Act does not introduce a mere prescription, and so affect only the matter of the remedy or mode of recovery available to the creditor. It introduces a positive limitation of the contract itself, which a Scotch Act could never intend to have effect beyond its own jurisdiction; nor could such an Act, however intended, have effect beyond Scotland. The foreign contract must be construed by the *lex loci contractus*, and is not, after being executed in one place, to be defeated merely by the residence of the parties interested happening to be elsewhere.

The Act does not apply to cautionry for the faithful discharge of an office, such as that of a tutor,⁶ or factor *loco tutoris*;⁷ nor to judicial bonds of caution in suspensions, sequestrations, confirmations, and the like;⁸ nor to the cautioner in an ordinary bond of presentation.⁹ But if the bond of presentation goes beyond the form usual and necessary for its

¹ Scot, 8th Feb. 1715, M. 11,012; Gordon, 16th Nov. 1748, M. 11,025; Wallace, 13th July 1749, M. 11,028.

² Opinion of Lord Fullerton in Alexander, 23d Dec. 1843, 6 D. 328.

³ Ewart, 29th July 1762, M. 11,027.

⁴ Stewart, July 1726, M. 11,010.

⁵ Alexander's case before cited.

⁶ Fleet, 5th Jan. 1707, M. 11,005.

⁷ Kerr, 5th March 1839, 1 D. 618.

⁸ Hogg, 13th June 1826, 4 Sh. 702; Gallie, 4th March 1836, 14 Sh. 647.

⁹ M'Kinlay, 3d Dec. 1736, M. 11,010.

proper purpose, and contains the usual clauses in an ordinary bond of caution, it will fall under the operation of the Act. It was so found in a case where the bond of presentation was by a principal and express cautioner; and the obligation was, that the principal should compare, at place and date specified, and pay the debt.¹ The reason in the above cases, where the Act does not apply, apparently is, that the bond is not for a sum of money instantly advanced in respect thereof; and, indeed, is not for money advanced at all. But that has not been invariably the rule. It would equally hold in such a case as *Monro's*, where, nevertheless, the Act was found to apply. Neither is the Act applicable to the case of co-obligants, in a separate bond of relief in favour of one of the parties to the principal bond,—although the bond of relief shows plainly who was the real debtor, and that the co-obligants were only his cautioners.² And, although parties granting guarantees or collateral obligations are truly cautioners, they are not entitled to the benefit of the Act. It has been so decided in the case of one granting a collateral obligation some time after the date of the principal bond, in which collateral obligation the party was not bound expressly as cautioner, nor had he a bond of relief apart.³ Nor is a collateral obligation of guarantee, granted of the same date with the principal bond, but not referred to in it, within the Act.⁴ The Act, moreover, does not extend to co-obligants, as in questions *inter se*, although each of them is principal debtor, and the others are only cautioners as to more or less of the sum in the bond; and although the bond contains a mutual clause of relief to the extent of the excess beyond their own proper debt.⁵ This case is very different from the pure and gratuitous cautionary obligation, and relative clause of relief, intended to bring parties within the benefit of the Act; and the words of the Act obviously do not reach the case of such co-obligants.

INTIMATION OF
BOND OF
RELIEF.

I now go on to the subject of the intimation of the bond of relief in favour of the cautioner, apart from the bond by the principal and cautioner to the creditor. When there is a bond of relief in favour of the cautioner, separate from the bond in favour of the creditor, it requires to be intimated to the creditor at the time of settling the transaction.⁶ Mr. Ross and some other writers speak of the intimation of the separate bond of relief, when given, as commencing the running of a seven years' limitation from the date of the intimation. But the Act of 1695 does not authorize such a view; and it would be inexpedient and unsafe to delay the intimation till after delivery of the principal bond in any case where the application of the Act is intended to be secured. The words of the Act are 'intimated personally to the creditor at his receiving of the bond;' and, this being the equivalent to a clause of relief in the bond, it appears to be meant that, in the one way or the other,

¹ *Monro*, 22d July 1741, M. 11,017.

² *Bruce*, 26th June 1793, M. 11,033.

³ *Caves*, 4th Dec. 1742, M. 11,020.

⁴ *Tait*, 8th Dec. 1836, 15 Sh. 221;

affirmed 21st July 1840; 1 *Robinson's App.* 137.

⁵ *Creditors of Park*, 16th Feb. 1785, M.

11,031. ⁶ *Bell's Comm.* i. 358.

the obligation of relief shall be communicated *unico contextu* with the delivery of the bond, and that the transaction, as a whole, as affecting the creditor, the debtor, and the cautioner, shall be one only.

It has been decided that the intimation of the separate bond of relief ought to be notarial or judicial.¹ At all events, mere private knowledge of the existence of the separate bond will not be sufficient. It was, however, sustained as enough, that the creditor was both writer and witness in the bond of relief, which was subscribed of the date of the principal bond.² But it would be unsafe to rely on this. In the case of Drysdale,³ Lord Gillies expressed doubt as to the soundness of the decision in M'Rankin's case, which the Lord President Hope said went as far as the Court could go. They accordingly found it not equivalent to intimation to the creditor of a separate bond of relief, that the same agent who acted for the creditor in preparing the principal bond, acted also in preparing the bond of relief. The safe and proper course, therefore, for securing the benefit of the Act when there is a separate bond of relief, is to intimate that bond to the creditor, notarially or judicially, at the time of delivering the principal bond.

Where the parties are within the Act, the expiry of the seven years operates, *ipso facto*, their entire liberation. It is not competent to prove the obligation by oath or otherwise, as in cases of short prescription; and when a cautioner, whose bond gave him the benefit of the Act, was called on to pay, and actually did pay, after expiry of the seven years, but in ignorance of the fact of expiry, though he knew the law, he was found entitled to repetition.⁴ The same principle was given effect to in a case⁵ where certain transactions had taken place on the part of the cautioner after expiry of the seven years, but he had granted no renewal of his obligation, and he was held free.

It has been questioned whether a cautioner can renounce the benefit of the Act. In the case of Norie,⁶ it was decided that he could not,—on the ground that the law was a public one, introduced to prevent bad consequences from men's facility in binding themselves as cautioners. But in the case of Douglas, Heron, and Company,⁷ and which was carried to the House of Lords by appeal,⁸ Lord Eldon, though he had no occasion to decide that point, expressed surprise at this doctrine. He says, 'If this was founded in public justice, no bond of corroboration could stand, as being out of the Statute; and, if it be matter of public policy, it is singular that a cautioner, paying the bond, has a remedy against the co-cautioner for forty years. In this country he would only have the same remedy which the creditor had against himself.' This point, therefore, must be considered as still open. But, when the benefit

EFFECT OF
LIMITATION.

RENUNCIATION
OF BENEFIT.

¹ Bell, 14th Feb. 1727, M. 11,039.

² M'Rankin, 22d June 1714, M. 11,034.

³ Drysdale, 25th January 1839, 1 D. 409.

⁴ Carrick, 5th Aug. 1778, M. 2931.

⁵ Yuille, 27th Nov. 1827, & 9th Feb.

1830, 6 Sh. 137, & 8 Sh. 485; affirmed

14th Sept. 1831, 5 Wil. & Sh. 436.

⁶ Norie, 19th Feb. 1724, M. 11,013.

⁷ Douglas, Heron, & Co., 1st March 1793, M. 11,045.

⁸ See 4 Paton, 133.

of the Act is to be waived, the simple course is to bind the cautioner as co-principal, without clause of relief in his bond, and without intimating a separate bond of relief, if any. The legal question is thus avoided, and the object of the creditor fully attained.

CASES IN WHICH
CAUTIONARY
OBLIGATIONS
EXTEND BEYOND
SEVEN YEARS.

The obligation of the cautioner, even when strictly of the character contemplated by the Act, does not always fall under the limitation introduced by the Act. It will be extended beyond the seven years in the following cases, viz. :—

1. When the term of payment of the sum of money in the cautionary obligation is distant more than seven years from the date of the obligation. The parties in such a case distinctly and expressly show their intention of being bound after seven years, notwithstanding the Act.¹

2. Where the bond has been renewed, or a corroboration granted, by the cautioner. This point has been already explained by reference to various cases.

3. The cautioner's obligation will also, agreeably to the provisions of the Act itself, extend beyond the seven years, where the creditor shall have raised diligence against the cautioner within the seven years.²

4. It is said by Erskine³ that nothing but diligence ought to prolong the obligation, and that even a declaration by the cautioner, that he stands bound for the debt, will not prevent the obligation from expiring with the seven years. But it is decided that the cautioner may be barred from pleading the Act, *personali exceptione*, by negotiations and otherwise, without diligence.⁴

Erskine further says, in the same section, that diligence raised within the seven years shall have no effect but to secure the special subjects affected by the diligence ; but the Court have deliberately adjudged the construction of the Act not to be so limited. It was found⁵ that arrestment used against the cautioner, within the seven years, preserved to the creditor all manner of diligence competent against the cautioner for what fell due within the seven years.

5. Mr. Bell says⁶ the obligation will be continued when the creditor shall have obtained decree against the cautioner, which it clearly will, if the decret be *in foro*. But Mr. Bell quotes in support of the doctrine only the case of Douglas, Heron, and Company, 1st March 1793, already referred to ; and from what passed in the Court of Session in that case, as well as from Lord Eldon's views on the point (which, however, he did not consider it necessary to decide), it seems doubtful whether decree in absence would be allowed the effect of continuing the cautioner's obligation. Mere citation in an action, at all events, is not sufficient to preserve the obligation. Such citation is enough to interrupt prescription ; but this is not the case of prescription.⁷ The execution of a sum-

¹ Millers, 19th February 1762. M. M. 11,045; affirmed 2d April 1800, 4 Paton, 11,027. 133.

² Irving, 7th Jan. 1752, M. 11,043.

³ Erskine, iii. 7. 24.

⁴ Douglas, Heron, & Co., 1st March 1793,

⁵ Hunter, 9th Jan. 1728, M. 11,041.

⁶ Bell's Comm. i. 358.

⁷ Stuart, 24th Jan. 1712, M. 11,039.

mons is said to have been found sufficient to bar the statutory limitation;¹ but Professor Bell² doubts the correctness of the short note of Clark's case given in Morison, and certainly citation ought not to be relied on.

6. Diligence, or action, however, though raised within the seven years, preserves the obligation only for the principal sum, with such interest as falls due before the expiration of the seven years; not for any interest accruing on the debt after expiry of the seven years.³ But where a charge of horning had been followed by denunciation, and duly registered, it was found that the cautioner was liable in interest after the seven years, both on the principal sum and on the interest due at the date of registration, in virtue of the Act 1621, cap. 20; and the same effect ought now to be produced by recording the charge in terms of the Personal Diligence Act.⁴

7. The Act has no operation against one of two or more cautioners compelled to pay the whole debt; and one of several cautioners, paying the whole debt within the seven years, has been found entitled to his relief against co-cautioners for their rateable shares during forty years.⁵ The report of Forbes's case, which is very short, does not express that the cautioner had paid under compulsion; but I cannot doubt that such was the fact, and the principle of the liability of the co-cautioner may be explained thus: The right of relief, competent to one of two or more cautioners, does not arise in virtue of an assignation from the original creditor; such assignation would merely place the cautioner paying the debt in the position of that creditor. The right of relief arises in virtue of the contract between the co-cautioners themselves, under which each of them is liable to relieve the other or others of his share of the debt. The claim under that contract—this legal right of relief—is not touched by the Act of 1695.

In regard to the extent of the obligation incurred by cautioners under their cautionary obligations, it may be stated, as a general rule, that they are not bound beyond the express terms of their bond. In particular, they are not liable for the expense of the discussion of the principal debtor, unless their bond is specially so framed as to subject them in that expense.⁶ But the guarantee of the sufficiency of the security, for the sums contained in a bond and disposition in security, extends not only to the principal sum in the bond, but also to the penalty in case of failure, with the interest and penalty in case of failure applicable thereto; and thus may sometimes be made to embrace expenses.⁷

The next point requiring notice is the benefit of discussion, available to cautioners. This arises *ex lege* under all cautionary bonds dated before the passing of the Mercantile Law Amendment Act (21st July 1856); and may be stipulated for in all bonds granted after the date of the Act.

¹ Clark, 10th March 1779, M. 11,043.

² Bell's Comm. i. 358, note 11.

³ Rowand, 13th June 1738, M. 11,041; Reid, 17th Feb. 1780, M. 11,043; Bell, *ut supra*.

⁴ 1 & 2 Vict. c. 114, ss. 5 & 10; M'Kilkin, 24th Feb. 1714, M. 11,040.

⁵ Forbes, Feb. 1776, M. 11,014.

⁶ Grant, 22d Feb. 1853, 15 D. 424.

⁷ Stewart, 1st June 1841, 13 Jurist 428.

The nature of this right we have already considered in connexion with the discussion of the several classes of heirs in heritable estate, and it is unnecessary to go into the subject again. But in cautionary bonds, granted before the passing of the Mercantile Law Amendment Act, discussion is excluded, when the principal and cautioners have bound themselves jointly and severally. In that case, each being liable *in solidum*, the cautioners, or any one of them, can be sued, without previously discussing the principal debtor. Discussion, moreover, is not available to one who has accepted a bill, or joined in a promissory-note as cautioner. These are commercial documents, involving the joint and several liability of all concerned to the holder.

There are a good many other cases of extrajudicial obligation in which discussion is excluded, or is not available to parties, though they are truly cautioners. But, as such matters are now in a great measure regulated by the Mercantile Law Amendment Act, I think it unnecessary to trouble you with details of cases arising on the older law, and not likely to occur, as the law is now altered. In general, such discussion is excluded also in judicial cautionries. In the suspension of a charge, after the letters are found orderly proceeded, the cautioner may be charged summarily on his bond. Such cautioner undertakes more of an accessory than a proper cautionary obligation.¹ In the loosing of an arrestment, the caution comes in place of the arrestment, and the cautioner is liable directly, as the arrestee would be, upon a decree obtained in a process of furthcoming against him.² In a process of advocacy, the attester of a cautioner is not entitled to the benefit of discussion.³ And the necessity for actual discussion may be excluded by circumstances. For example, the bankruptcy of the principal debtor is sufficient discussion;⁴ because it carries away his whole estate to his creditors, and leaves nothing which the holder of the cautionary obligation can discuss. Again, where the cautioner was bound as full debtor, for and with the principal debtor, and the latter had died insolvent, discussion of the debtor's heirs was found unnecessary.⁵ Moreover, where the principal was abroad, and had no estate within the jurisdiction of the Scotch Courts, it was found not necessary to discuss him, or his foreign estate, if he had any.⁶ In Montgomery's case, the benefit of discussion was said not to be available to a cautioner, when the creditor could not have *parata executio* against the principal debtor; as, for example, in consequence of his death; but it is now fixed that the death of the principal debtor does not of itself deprive the cautioner of the benefit of discussion as against his heirs.⁷

¹ Hume, 6th January 1681, M. 2142; Strachan, 17th June 1714, M. 8125 and 3583, the latter correcting Houston, 27th Feb. 1702, M. 3580.

² Dickie, Dec. 1743, M. 2110, and 3586.

³ Henderson, 12th June 1824, 3 Sh. 133.

⁴ Bell's Comm. i. 350.

⁵ Montgomery, 18th June 1713, M. 3586.

⁶ Elams, 7th Dec. 1757, M. 2110, and 3586.

⁷ Wishart, 16th May 1835, 13 Sh. 769; reversed 12th May 1837, 2 Sh. & M'L. 564.

I have next to notice that cautioners, when not bound jointly and severally, have further the benefit of division ; unless the subject-matter of their obligation be indivisible. But in the words of Lord Stair,¹ even if the obligation is not joint and several, and the matter of it is not an indivisible fact, each cautioner is liable for what is wanting by the principal, and what is wanting by the other cautioners. This doctrine is otherwise expressed by one of the commentators on Stair in these words : ' When they ' (cautioners) ' become bound all at one time, they have the benefit of division, and are liable only *pro rata*. But this imports no more than a dilatory defence, for they are further liable *in solidum* to make good the shares of the other cautioners, if found insolvent. If they become bound as principals, *i.e.*, conjunctly with the principal, they renounce the benefit of discussion. If they become bound conjunctly and severally, they renounce likewise the benefit of division.'²

We have now to consider the Cautioner's Right of Relief. Cautioners have the right of relief, *in toto*, as against the principal debtor, on whose mandate or request they have become bound ; and, where there are two or more cautioners, they have the right of rateable relief, *inter se* ; which rights subsist for forty years, and are available, *ex lege*, on the principles already explained. But it is usual and proper for cautioners, in all cases, to take a bond of relief from the principal debtor. Such bond, as now in use to be framed, proceeds on the narrative of the principal obligation, and that the sum therein was, or was to be, wholly received by the principal debtor, and applied for his use, and that he only is the true debtor therein ; the cautioner having joined in the bond at his desire. The principal debtor, therefore, binds himself and his heirs, etc., in usual form, to relieve the cautioner from payment of the sums contained in the bond, and of the bond itself, and of all loss, damages, or expenses which the cautioner may sustain through his having become an obligant in the bond. For which effect, if the bond is for a capital sum actually advanced, the principal debtor binds himself either to pay the debt, when it falls due, to the creditor, and to deliver up the bond discharged to the cautioner ; or otherwise, in the cautioner's option, to pay the debt to the cautioner himself, so that he may discharge it, and thereby operate his relief. The object of such bonds is to give the cautioner summary means of enforcing his relief, when the proper time for payment of the debt arrives, and for reimbursing himself of all loss and expenses arising through failure to relieve him.

In earlier times, cautioners with simple obligations of relief had no direct right to sue the principal debtor, or do diligence against his estate for relief, until they were exposed to distress at the instance of the creditor. Towards remedying that evil, and placing the cautioner in an independent position, the bond of relief was made to bind the principal

¹ Stair, i. 17. 12.

² See also, on this subject, Bell's Principles, 267, and the authorities there cited.

CAUTIONER'S
RIGHT OF RE-
LIEF.

debtor to make payment to the creditor, and procure the principal bond discharged, by a particular term; and a bond with the latter obligation was found to authorize a charge, at the cautioner's instance, against the principal debtor, *ad factum præstandum*, though the cautioner had suffered no distress.¹ But the remedies were still imperfect; and to give the cautioner, without making payment to the creditor, as full right as if he had actually paid the debt, there was devised the additional and alternative clause, binding the debtor, in the cautioner's option, to pay the debt to the cautioner himself, and thereby enable him to operate his relief. This obligation, Mr. Ross says,² with some professional enthusiasm, 'gave perfection to the bond of relief. It put it in the power of the cautioner to secure himself at any time when he thought proper, without being distressed, or paying up the debt himself.' You will observe, however, that the obligation to pay to the cautioner ought not, as in some forms, to be made conditional on failure to pay the debt to the creditor. In that case, Mr. Ross says, two charges would be required against the principal debtor for enabling the cautioner effectually to operate his relief; one, *ad factum præstandum*, for establishing that the condition of paying to the creditor had not been fulfilled; the other, for payment to the cautioner, as the result of such failure. Whether such would be the result, or whether it would not be enough for the cautioner to aver (if consistent with the fact) that the debt is not paid to the creditor, and thereupon to charge for payment to himself, it is not necessary to inquire. In preparing such bonds, the risk of question on that point ought to be excluded, by making the obligation for payment to the cautioner independent of any condition, and a direct ground of charge for payment to be made to himself.

The right, at Common Law, to sue for relief, or withdraw from a cautionary obligation, is a practical point of great importance. One of two cautioners under a cash-credit bond to a bank, which had been operated on for some years, was found entitled to sue the principal debtor for total relief, without having made payment of the debt.³ And, where two cautioners were bound jointly and severally, one of them, after paying up his own share, was found entitled to sue the other to pay up his share; so that the bond might be fully discharged, and his relief against liability for his co-cautioner's share secured.⁴ But a cautioner, without making payment, has no right of action against his co-cautioners.⁵ Even on making payment, if that is done prematurely, there is no right of immediate recourse against the principal;⁶ and, when the cautioners are not bound jointly and severally, one or more of several, liable in payment of a sum of money, has no interest, when called on to pay his own rateable share, to object that the whole cautioners are not called.⁷

The cautioner for a cash-credit or account-current with a bank, or

¹ Paton, 7th July 1668, M. 2119.

² Ross, i. 170.

³ Alston, 2d Dec. 1828, 7 Sh. 112.

⁴ Low, 8th Feb. 1831, 9 Sh. 411.

⁵ Alston's case.

⁶ Owens, 26th Dec. 1833, 12 Sh. 130.

⁷ Macarthur, 15th Dec. 1836, 15 Sh. 270.

other obligee, can, by giving notice to the obligee, stop further advances on his responsibility.¹ The cautioner for the fidelity of one holding the office of agent for a bank, and who has continued bound for several years, may insist to be relieved by the delivery or cancellation of his bond.² The same was found as to the cautioner for a collector of taxes, against whom arrears were standing, which, in terms of his bond, he ought to have paid up. The decision was pronounced in an action, brought some years after the bond of caution was granted, and, although the bond contained no clause of relief, the cautioner's right to withdraw was held good at Common Law.³ The cautioner in an ordinary suspension, however, is not entitled, without consent of parties, to withdraw and terminate his obligation, even so as to be freed of liability for future expenses.⁴ And as to ordinary cases of cautionry for the discharge of an office, Baron Hume says, in the report of Taylor's case,—‘It must always be understood that the cautioner for a bank agent, when he means to withdraw, does not act capriciously or precipitately, but gives timeful notice of his purpose, and allows a reasonable period for the agent to find another cautioner, or the bank to name another agent.’

The bond of caution for a bank agent, or other person appointed to an office of trust and responsibility, has some peculiarities which it is right to notice. Such bonds recite the appointment on condition of finding caution; and therefore the agent, as principal, and his cautioners, bind themselves, jointly and severally, to the following or some similar effect:—

BOND OF
CAUTION FOR
BANK AGENT.

1. That the agent shall be honest, faithful, and diligent in the discharge of his duties.

2. That he shall observe and execute all instructions and regulations communicated to him, from time to time, from those in authority over him.

3. That he shall account for all money, papers, and property intrusted to him, or coming into his hands, in the execution of his office; and, whenever required, pay over the money and deliver the papers to the head officers of the concern, or others having their authority.

4. The agent and cautioners bind themselves to make good all loss arising through non-fulfilment of these obligations, or otherwise by the error, fault, or fraud of the agent, immediately on the loss being sustained, with the usual penalty in case of failure, and interest at five per cent. during the not-payment.

5. The bond then contains (like a cash-credit bond) a provision for liquidating and ascertaining the amount of the balance due by the agent, by means of a certificate or account under the hand of one of the head

¹ Bell's Principles, 266.

² Taylor, 3d July 1818, Hume, 114.

³ Kinloch, 13th June 1822, 1 Sh. 491.

⁴ It was so decided by the Second Division, on a motion in a Jury cause, brought forward in 1841, but the deliverance of the Court is not reported.

officers of the concern; and the usual stipulation against suspension of a charge for such balance, except on consignment.

6. There is then a condition that the cautioners shall be bound only for a limited sum, or, it may be, that they shall be respectively liable for certain specified sums, of equal or different amount, and no more; with proportional penalty, and with interest from the date of demand upon them; the agent's own obligation being without limitation.

7. It is usual, though perhaps not absolutely necessary, to insert a declaration that the holder of the bond shall, as creditor on the agent's estate, be preferable to the cautioners, as creditors for any sum they may advance under the bond.

8. It is also usual, in bank-agents' bonds, to stipulate that in case of the agent's death, or removal from his office, none of the bank-notes, etc., in his custody shall be subject to any claim by him, or his representatives or creditors; but that those having authority from the bank shall be entitled summarily, and without judicial authority, to take possession of the whole.

9. The agent then binds himself in usual form to relieve his cautioners.

All these obligations are undertaken by the principal and the cautioner (so far as he is bound), jointly and severally.

When we come, however, to consider the various ways in which cautioners are liberated in consequence of laxity, or irregularities, on the part of those to whom, by the terms of their bonds, they are accountable, we shall see that, however comprehensively and distinctly such bonds may be framed, the grantees are not enabled to screen themselves, by the use of words, from the necessity of due and reasonable watchfulness over their agents. The cautioners are entitled to expect, and the law will secure to them, notwithstanding the most stringent clauses to the contrary in any bond, a fair regard to their interests; and the obligees, if remiss in fulfilment of their own duties, are not entitled to turn over the consequences on the cautioners. The cautioners bind themselves to make good losses arising by the agent's fault or fraud. They are not cautioners for the remissness of the constituent.

The clauses relative to ascertaining the balance due, by certificate or stated account, and suspending a charge on consignment only, are open to the remarks made on the like clauses in the cash-credit bond. And a bank agent's bond, as usually framed, though it warrants placing to the account bills for which the agent was liable, so as to authorize summary diligence therefor, does not warrant so placing untaxed law expenses, in relation to such bills, incurred by the bank after the agency had terminated.¹ The agent's bond stipulates for the right of those in authority over him to take over cash, etc., summarily, and without judicial warrant. It is proper that there should be power to take instant possession of whatever funds, etc., may happen to be in the agent's hands. But of

¹ Paisley Union Bank, 24th Feb. 1831, 9 Sh. 488.

course a most exact account and inventory of the whole ought to be made up, with the assistance, if possible, of the agent, or some one on his behalf; and the inventory should be carefully authenticated and preserved.

I have now to notice some points to be kept in view by cautioners in reference to paying the debt for which they have bound themselves, and the course to be adopted by them when compelled to pay. It is not safe for the cautioner to pay the debt before it actually becomes due, because the principal debtor may previously acquire some good defence against payment; and, at all events, immediate recourse does not arise on premature payment by the cautioner.¹ Neither is it expedient for a cautioner to pay otherwise than upon distress, that is, after the creditor has taken some legal step against him for enforcing payment; and after intimation of the distress to the principal debtor, who ought also to be cited in any action brought against the cautioner for recovery of the debt, because he may have legal objections to payment. A cautioner paying voluntarily, and without intimation to the principal, does so at his own risk. One having so paid, and thereafter prosecuted the proper debtor, the Court assoilzied the debtor, because he had a good defence, which would have liberated both himself and the cautioner, and not only had he, the proper debtor, not been cited, but the distress had not been intimated to him.² When a cautioner pays a debt, past due, and against payment of which the principal debtor had no defence, his right of relief is absolute and immediate, and he requires no assignation from the creditor for enabling him to operate his relief.³ He has bound himself at the request of the debtor, against whom he has the *actio mandati*, the right to raise which arises by law to him, as cautioner, not as assignee of the creditor.⁴ A discharge, or other evidence of payment, is, therefore, sufficient to authorize the cautioner to sue for relief, whether against the principal debtor *in toto*, or against co-cautioners for their shares. But it is usual and proper for the cautioner, on making payment, to obtain a discharge and assignation exonerating him individually from liability for the debt, and assigning the debt to him. By virtue of this deed, he has all the rights and privileges both of the cautioner and creditor vested in him; that is, as against the proper debtor. Of course, as against co-cautioners, he has no claim beyond relief of their rateable shares of the debt.

The creditor is bound, on receiving full payment from the cautioner, to grant him an assignation, if desired, as well as a discharge, unless he can establish that the assignation will be prejudicial to himself.⁵ The cautioner's right to such assignation (*beneficium cedendarum actionum*) is founded on equitable considerations, and gives him right (subject to the qualification just expressed) to a transfer, not only of the debt, but also

¹ Owen, 26th Dec. 1833, 12 Sh. 130.

² Maxwell, 19th Dec. 1632, M. 2115.

³ Craigie, 21st December 1710, M. 14,649.

⁴ Ross, i. 224.

⁵ Erskine, iii. 5. 11; M'Gillivray, 10th June 1826, 4 Sh. 697; Gilmour, 11th Dec. 1832, 11 Sh. 193.

of the securities held therefor, and diligence, if any, used for payment.¹ When the assignation is granted, the cautioner can use the creditor's rights of realizing the subjects of security, by sale or otherwise; and it is not relevant to allege, in bar of these rights, that he had obtained the assignation without ever having been distressed.² The cautioner, by paying the debt, has brought the cautionry to an end *confusione*, and has, as assignee, become creditor. He cannot therefore be prevented from selling, 'now that he is full creditor under the bond.'

ASSIGNATION OF
HYPOTHEC.

The cautioner in a tack is entitled, on paying rent or arrears due by the tenant, to an assignation from the landlord of his right of hypothec over the tenant's crop and stocking for security and payment of the rent and arrears so paid;³ and such cautioner ought, on paying, to take an assignation to the hypothec, otherwise the preferable claim founded on the right of hypothec will be gone, and a creditor of the tenant, attaching the subjects of hypothec by arrestment, will be preferred to the cautioner over such subjects.⁴ The case, however, seems to be different in mercantile cautionries. It is to be observed also, that the landlord, if his right of hypothec covers both the bygone and current rents, cannot be required to assign his right absolutely to a cautioner paying only bygone rents. The landlord will assign only under reservation of his own preferable claim in security of current rents. Again, in the case of an ordinary debt, when the same is not paid by the cautioner out and out; for example, when the cautioner is liable for, and pays, only the interest; the creditor, it is true, is bound to grant him an assignation of the security for the interest, but the creditor himself still holds such security as in right of the principal sum due, the penalty if incurred, and the future interests. In these circumstances, the creditor will assign to the cautioner so as to give him only a right and security postponed to the creditor's own right and security.⁵ But the creditor who holds a cautionary obligation cannot, at his own hand, and by a new and subsequent transaction, to which the cautioner is no party, injure the cautioner's position and rights in regard to an assignation of the security for the debt affecting the cautioner. A party lent money on bond and disposition in security by a principal for the whole debt, and collateral obligation by a cautioner for payment of the interest; the same party afterwards made a further loan to the same debtor on a second bond and disposition in security. The subject of security was the same in both bonds. The second loan and security were transacted without consent of the cautioner liable for payment of the interest on the first loan, who was no party to the second transaction. The debtor became bankrupt, and, the heritable security having proved inadequate to the discharge of both debts, the cautioner for the interest of the first debt was found entitled, on paying the interest

¹ Lesly, 10th Jan. 1665, M. 2111; Erskine, 14th Jan. 1780, M. 1386; Lowe, 17th Feb. 1825, 3 Sh. 543.

² Gray, 24th Nov. 1847, 10 D. 145.

³ Stewart, 31st May 1814, F. C.

⁴ Garden, Feb. 1735, M. 3390.

⁵ Erskine, iii. 5. 11.

on the first bond, to an assignation of the first security to the extent of any interest he might pay, and to be ranked, as in right of such interest, on the subjects of security, preferably to the creditor to whom he was cautioner, and who granted him the assignation, although such creditor, in consequence, lost part of his second loan.¹ The report of this case is 'full of instruction, containing the elaborate opinions, distinguished by learning and legal subtlety, of Lord Mackenzie in support of the judgment, and Lord Moncreiff for the opposite view.'²

As regards the cautioners' relief *inter se*, where one of three cautioners, CAUTIONERS'
RELIEF *inter se*. bound jointly and severally, pays the whole debt on assignation, he is entitled to recover one-half from one of the other two cautioners, the third being dead, and (as alleged) insolvent, on granting an assignation of one-half of the debt and securities.³ If, however, the cautioner transacts the debt, or obtains any abatement at settlement, he is bound to communicate the benefit to the principal and co-cautioners.⁴ And if one of several cautioners, jointly and severally bound for the same debt, obtains from the proper debtor a security over his estate for relief of the obligation, he is bound to communicate the benefit of it to the others.⁵ But if the security is given by a third party, and does not affect the debtor's estate, the obligation to communicate does not arise.⁶ A further exception from the general rule was allowed in a case⁷ where two of three cautioners for separate amounts of the composition to the principal debtor's creditors, bound by the same deed, but not jointly, or for and with one another, established claims of compensation upon the common debtor's estate, by purchase from the debtor, and other onerous *bond fide* transactions. The two cautioners thereby operated full relief to themselves, and were found not bound to communicate the benefit of these claims of compensation to the third cautioner. But you will observe that the relief which the two cautioners obtained was not properly through a security over, but by the purchase of, part of the debtor's estate, and other onerous transactions. The case, therefore, hardly establishes a rule in reference to securities, though it may be a good warning to any one carrying through a composition-contract where there are several cautioners,—suggesting the propriety of a special clause to protect each of the cautioners against preferences being obtained in any way by any of the others out of the common debtor's estate.

When the cautioner in a bond is bound in the character of a principal, and the bond does not show that he is merely a cautioner, he ought not, on paying up the debt, to take a mere receipt and discharge, as that would extinguish the bond as a document of debt and ground of diligence; nor ought he to take a discharge and assignation in his own favour, because, *ex facie* of the bond, he is one of the joint and several

¹ Sligo, 18th July 1840, 2 D. 1478.

² Menzies, p. 220.

³ Finlayson, 20th December 1827, 6 Sh. 264.

⁴ Brodie, 27th July 1872, M. 3393.

⁵ Milligan, 20th May 1802, M. 2140.

⁶ Coventry, 16th June 1830, 8 S. 924.

⁷ Lawrie, 6th June 1823, 2 Sh. 368.

obligants, and he could not do summary diligence even against the principal debtor for the whole debt. He would be barred *personali exceptione* from doing diligence for the whole sum in the bond; he could do diligence for no more than the proportion falling on the principal debtor, *ex facie* of the bond. In the case supposed, the cautioner ought to get the bond assigned to a third party, *ex facie* absolutely, but truly in trust for him. That being done, the assignee can proceed with summary diligence for the whole debt against the principal debtor, who has no defence in law, and will in this way be excluded from any defence in form. The assignee can also proceed against the co-cautioners for recovery of their proportions.

The substantial rights of parties jointly and severally bound, however, cannot be affected by having the debt assigned to a third party, as here proposed; and, when each of the parties so bound has a rateable right of relief and recourse against the others, it is not competent for one of them who pays the debt, by getting the debt assigned to a third party, to impose on the others a different rule of settlement from that which would operate if he had himself been the assignee.¹

ADDITIONAL SECURITY.

Let us now consider the right of relief arising when additional security is obtained for payment of a debt already secured by a cautionary obligation.

A creditor sometimes obtains additional caution, by bond of corroboration or otherwise, saving to him all the effects of the caution originally given. This frequently happens when an original cautioner dies or becomes insolvent; or when a demand of payment is made which cannot be satisfied; or when the principal debtor is charged to pay, and suspends on caution, or in other circumstances.

The rules of relief in these cases are :—

1. That if the additional cautioner has become bound at the desire of the principal debtor, not of the original cautioners, nor to relieve them from an impending demand, then, in any question between the new and original cautioners, the new cautioner has only a rateable relief, in the same way as if he had been one of the cautioners under the original bond.²

2. If the new cautioner has interposed on account or at the request of the original cautioners, or if he has become cautioner in a suspension at their instance, or even if they have been apprised of the application to the new cautioner, and have approved of it, as tending to relieve themselves from present demand, then the new cautioner is, as it were, cau-

¹ Gilmour's case, before referred to. In a previous stage of the same case (Gilmour, 8th July 1831, 9 Sh. 907), Lord Moncreiff exposed the practical futility of an attempt of the nature above indicated, by showing that if the one party got a friend to interpose, and pay on assignation, the other might equally obtain the aid of a friend, and require an assignation in his favour. 'The Lord Ordinary sees very well that

'the parties will never come to a fair settlement in this way of proceeding. They must meet in their proper persons, for this course of interposing a friend, as a third party, may be repeated *ad infinitum*.'

² Bell's Comm. i. 351; Ker, Feb. 1865, M. 14,641; Smiton, 15th Nov. 1792, M. 2138.

tioner for the original cautioners ; and on that footing is entitled, in any question among the cautioners, to total relief from the original cautioners.¹ On this principle, the cautioner in a bond, against whom, along with the principal, decret had been pronounced in a suspension, was found liable in total relief to the cautioner in the suspension who had paid the debt and obtained an assignation.²

Prior to the Mercantile Law Amendment Act, which altered the rule as to discussion in the case of cautioners, the legal presumption was that the new cautioner had interposed for the debtor alone, because the debtor was liable in the first instance, the original cautioners only after he was discussed ; and particular indications were required to establish the right of the additional cautioner to total relief from the original cautioners.³ Among such indications, it seemed sufficient that a demand had actually been made against the original cautioners,⁴ and that the creditor had forborne to urge payment on receiving new cautioners ; or that, the debtor being abroad, and having no funds in this country, a state of circumstances which allowed the creditor to have immediate recourse upon the cautioners, the creditor had made his demand upon them ; or that the original cautionary obligation was near expiry, and recorded for diligence.⁵ How far the Act will alter the legal presumption in cases where the benefit of discussion is not stipulated for by cautioners, is a point not yet settled. But, when additional cautionry is being granted, there can be no difficulty in ascertaining on whose account it is interposed ; and, in order to exclude all risk of question on that point, it would be desirable that evidence should be preserved for instructing how the fact really stands. The evidence should of course be in probative writings.

3. Where a party has paid a debt for which he made himself liable, *subsidiarie ex delicto vel quasi delicto*, he is not entitled to any relief against the proper cautioners. Such is the case of the granter of a bond of presentation, who has failed to present the debtor in terms of his obligation. He is not entitled to relief from another against failure to fulfil his own obligation.⁶ And, generally, the principal debtor is not liable to relieve the cautioner of damages arising by the cautioner's own fault.⁷

We now pass to the examination of ordinary Bonds of Corroboration. Such bonds are in use to be granted under a variety of circumstances, in particular:—

1. By the original obligant, when any question has arisen between him and the creditor, involving the possible extinction of the original

¹ Bell's Comm. i. 352 ; Pollock, 10th July 1745 ; Elchies, *voce* Cautioner, No. 16.

² Broomhall, July 1687, M. 14,643.

³ Loch, 18th Dec. 1701, M. 14,644 ; Pollock's and Smiton's cases, above cited.

⁴ Clarkson, 1st Dec. 1703, M. 14,645 ; M'Kenzie, 30th Nov. 1752, M. 14,661.

⁵ Pollock's case.

⁶ Smith, 11th Dec. 1811, F. C.

⁷ Stewart's Answers to Dirleton, p. 24 ; Mathieson, 31st Jan. 1678, M. 2120.

bond, and when such question is compromised. The compromise ought to be followed by a bond of corroboration. When such question is settled by decree, there is no need of a corroborative bond; the decree of Court being equivalent to the bond, followed by registration.

2. By the original obligant, when it has been agreed to accumulate interest in arrear, with the original debt, into one principal sum, bearing interest. The arrears of interest would not carry interest *ex lege*; but it is lawful to constitute them a capital sum, bearing interest, by means of a bond of corroboration.

3. When a debt is constituted by account, or acknowledgment, or otherwise, without the privilege of summary diligence, or where the sum in a bill is likely to lie over for more than six years, whereby the bill may prescribe, a bond, or bond of corroboration, is frequently required, on condition of postponing the term of payment. This is important in cases where debts of the above description are likely to subsist for any long or indefinite period.

But, as to such cases, you will remember that, as the Act 1696, cap. 5, strikes against corroborative securities granted within sixty days of bankruptcy, care has to be taken not to give up existing vouchers, and, specially, not to part with direct or collateral securities, on the strength of the bond of corroboration, at least until the latter is unassailable; because, as before observed, it does not always follow that, on the bond of corroboration being set aside under the provisions of the Act, the old vouchers and securities will be restored, and there are securities, in various forms, which it may be impossible to recover,—for example, a bill or promissory-note by several parties. Such document, if delivered up, may have been cancelled.¹

4. When a new obligant joins in the liability for a debt already due, a bond of corroboration is taken from the original and new obligants, binding them, jointly and severally, for payment to the creditor. And here it will be recollected that evidence should be preserved for instructing whether the new obligant has interposed his credit at the request of the whole of the original obligants, or only of the proper debtor. Care must also be taken in such a case to bind the new obligant by the use of the proper obligatory words. If the bond of corroboration omits the words necessary for that purpose, he will be free.²

5. A bond of corroboration is sometimes granted to the representative of the original creditor, with the object of saving him from the expense of completing a title to the debt by the process of confirmation. But that object is of questionable propriety; the probate and succession duties being debts due to Government, which it is not optional to pay or withhold.

6. When a debtor dies, his heir or representative, though liable to be sued for payment, cannot be charged summarily on the original bond, to

¹ Bell's Comm. ii. 232.

² Coult, 12th July 1749, M. 17,040.

which he was no party. The debt requires to be constituted against him in the first place, which can be done either by the decret of a competent Court, or by his granting a bond of corroboration; and, when he is of full age, and subject to no legal incapacity, it is generally expedient to take such bond from him. But, even if the debt be due on bond and disposition in security, the bond of corroboration to be granted will be personal only, as a personal obligation is enough to obviate any objection or difficulty in reference to the creditor's remedies.

If the heir of the original debtor is liable as heir of entail only, it is specially important to obtain from him a bond of corroboration, in order to bind his heirs-general as well as his heirs of tailie for the whole debt. His heirs-general would not be made liable by his mere succession as heir of tailie, except for the interest falling due during his possession of the estate, and unpaid at the time of his death.

The general rules for framing such bonds are substantially the same in all these cases. The bond of corroboration ought to narrate the original bond, or other voucher of debt, the title of the assignee or executor, if the bond has formed the subject of assignation or succession; and then, the special reason for the new obligation, which in all cases will be granted 'without prejudice to the original bond' (or other voucher), 'or to any diligence or execution thereon, but in corroboration thereof, *et accumulando jura jureibus*.'

When the debt corroborated comprises any special security, the bond of corroboration ought to contain a declaration that, on payment, the granter shall be entitled to an assignation of that security. And when a representative, liable only as heir of entail, grants the bond, he ought to reserve to himself, and his heirs-general, their right of relief against the succeeding heirs of entail and the entailed estate, and to stipulate that on payment he shall be entitled to an assignation from the creditor.

Bonds of corroboration presuppose, and must necessarily refer to, some existing debt. But, though they are to that extent accessory, they subsist of themselves when granted, and are the proper foundations both of actions and diligence at the creditor's suit, independently of the original bonds, because the debtor's corroboration of the debt constitutes, of itself, a proper obligation against him.¹ They are, however, struck at by the Acts 1696, cap. 5, and 1621, cap. 18, as we have already remarked;² even when the effect is simply to enable a creditor to proceed with diligence, and obtain a *pari passu* preference, which he might have obtained without the corroborative bond.

¹ Beg, July 1663, M. 16,091; Johnston, 24th Feb. 1676, M. 15,798.

² Mackellar's Creditors, 1st March 1791, M. 1114; Dunbar's Creditors, 18th June 1793, M. 1027.

TITLE II.

ASSIGNATION OF PERSONAL OBLIGATIONS.

CHAPTER I.

HAVING now considered the more usual forms in which ordinary personal obligations (other than those by bills and promissory-notes) are constituted, I proceed to the consideration of the assignments and other writings by which bonds and debts, and other moveable property, are transferred.

Abbreviated forms for such assignments were authorized by the 'Transmission of Moveable Property (Scotland) Act 1862 ;'¹ but, before considering these forms, it may be convenient to examine the forms in use before that Act came into operation, both because the Act does not abolish the older forms, and because the examination of the older will aid you in understanding the new forms.

OLDER FORMS.

Before the above Act was passed, the simplest form of the assignation of a personal bond, and a form which has been extensively in use, consisted of the following parts or clauses, viz. :—(1.) The narrative, which runs as follows :—' I, A., in consideration of the sum of £
' instantly paid to me by B., whereof I hereby acknowledge the receipt,
' and discharge him ;' (2.) the clause of assignation, which is in these terms, ' do hereby assign, convey, and make over to the said B., and his
' heirs, executors, or assignees, the sum of £ of principal, with a
' fifth part more of penalty in case of failure, and the interest of the said
' principal sum from and after the date hereof, during the not payment,
' all contained in and due by a bond dated granted by
' C. in my favour.' Then follows the assignation of the bond itself, ' with
' the whole clauses and obligations therein contained, and all that has
' followed, or is competent to follow thereon.' To this is subjoined (3.) a clause ' surrogating and substituting the said B., and his foresaids, in
' my full right and place of the premises, with full power to uplift and
' receive, and to discharge or assign and convey, the said sums of money

¹ 25 & 26 Vict. c. 85.

'and the said bond, and generally to do, or cause to be done, everything in the premises which I could have done before granting this assignation.' Then follows (4.) the warrantice clause, 'which' (that is, the assignation) 'I bind myself to warrant from my own facts and deeds only;' (5.) clause of delivery of the bond, 'and having herewith delivered up the said bond;' and lastly, the registration and testing-clauses.

This form, you will observe, corresponds exactly with its professed object, viz., to make over the debt and bond from the holder to a new creditor. But an older form of the assignation, which, before the passing of the Act of 1862, was largely in use on the conveyance of a personal bond from the first holder to a new creditor, requires attention. This latter form usually contains a recital of the bond, and an acknowledgment of the receipt from the new creditor of the amount of the debt. But, like the form first here given, it may at once proceed to the acknowledgment of receipt of the money from the new creditor, without previously reciting the bond.

The receipt being acknowledged, the deed, in the form under consideration, proceeds, not as in the style already given, to assign the debt, but to constitute and appoint the new creditor, and his heirs and donators, the granter's cessioners and assignees; in and to the sums contained in the bond, and in and to the bond itself, and all that has followed on it, etc., surrogating, etc., as in the form already given.

In order to understand the peculiarities of this latter form, it is necessary to keep in view the nature of the subject or right which the deed transfers. It is moveable or personal, but not corporeal; it is not, like furniture, live stock, etc., a subject of which the *ipsum corpus* is in the owner's possession, or which he is to hand over bodily to a purchaser or assignee. What he transfers is the right to receive, and, if necessary, to raise action or suit for recovering, from a third party, a sum of money due on bond. Corporeal moveables, which are in one's actual possession, are transferred by mere delivery from the existing owner to the new owner. But as to incorporeal moveables, the owner can only give a right to enforce payment or recovery. For this reason, rights of the latter class have been technically called in England 'choses in action,' that is, things of which you have not the occupation, but a right to occupy, things of which the possession may be recovered by an action or suit, and which have no separate tangible existence in themselves. This term, Mr. Ross¹ says, was brought into use when the language of the law of England came to be Norman, and in lieu of it, I observe, our legislators are now substituting in plain English the term 'things in action,' which last term is so made use of in the Joint-Stock Companies' Act of 1856.² It is there employed along with the general terms 'property and effects,' and as obviously distinguished from what is covered by these terms.

We naturally ask why, nevertheless, a simple transfer was not made

¹ Ross's Lectures, i. 177.

² 19 & 20 Vict. c. 47.

HISTORY OF
OLDER FORM OF
ASSIGNATION.

use of to pass the right to a 'thing in action' from one owner to another; the right being indefeasible, and, according to our present notions, essentially transferable in its nature? In explanation, we find from Lord Stair and Erskine,¹ that, in old times, it was as much contrary to law for one creditor to substitute another without consent of his debtor, as for one debtor to substitute another without consent of his creditor; and that, when the transfer of a bond was to take place, it was necessary for the creditor, in order to evade the law, to resort to the device of appointing the new creditor his attorney or mandatory for the express purpose of receiving and discharging the debt. In the ordinary case of mandate, the attorney is liable to account to his constituent. But that would have been inconsistent with the purpose of such an appointment as we are considering; and, accordingly, the mandatory in this case was to apply the money, when received, to his own use, without liability to account. The old style of bonds, also, we are told, had this in view, being taken payable to the creditor or his attorney; and it will be observed that the term 'assignment,' in its strict sense, is not equivalent to transference, it means nothing more than an appointment or deputing, and the sense in which we now understand it, as connected with legal writings, is altogether acquired from its use as coming in place of a transfer.

We appear to have been first led to make a change in the old form on account of our intimate connexion with France, and the desire, which at one period of the history of Scotland was very prevalent, of adopting French models. The French, in the transfer of their debts, had adopted delegations from the Roman system, that is, the substitution, with consent of the debtor, of a new creditor for the old. But in addition to these, and in order to avoid the necessity of procuring the debtor's consent, they introduced a writing called by them a 'transport,' strictly equivalent to our word 'transfer.' The maker of this deed was called 'cedant,' and the receiver 'cessionnaire.' For a time the new creditor was described in Scotch practice as the lawful, undoubted, and irrevocable cessioner and assignee of the old. These terms bear strong marks of the gradation from attorney to principal, and at length we came to describe the new creditor simply by the terms cessionary and assignee; the assignment, however, still retaining the form of appointment, and not adopting words of simple transfer.

Mr. Ross considers the necessity, very early introduced in our law, of intimating to debtors the assignments of their bonds, as instructing the substantial nature of the change adopted in our forms as above explained; that is, the change from the appointment of an attorney to that of a cessionary on the transfer of a debt. It is obviously unnecessary in principle to make intimation of the mere appointment of an attorney, which, in strict law, infers no divesting of the party, but leaves him in the full legal right. Accordingly in England, where the form of deed was not altered, and the appointment of attorney remained as the form

¹ Stair, iii. 1. 2; Erskine, iii. 5. 2; and Ross, i. 179.

in which transfers were made, not only intimation was not necessary, but the attorney could not prosecute in his own name, though undoubtedly the debt was his. He required to use the name of the original creditor in suing for payment; and the English assignment made provision for this by binding the granter to allow his name to be made use of, and not to receive payment from the original debtor. In the case of *Tayler*,¹ an opinion was obtained from English counsel as to the validity of a document executed in England, and purporting to be the transfer of a debt due on account, a 'chose in action,' and it was stated that 'chooses in action' are incapable, at law, of being made the subject of any transfer or assignment, though, in equity, they can be assigned. I suppose that, at law, they can only be transferred by the appointment of an attorney. With us it was different, at least after the assignation came to constitute the new creditor cessionary as well as assignee. It was necessary to intimate the right of the new creditor to the debtor; not only in order to certify him that the original creditor was divested, but also to complete the right of the cessionary in competition with other assignees.²

The Act of 1862 introduces new and short forms for the assigna-
tion of personal bonds or conveyances of moveable estate. These words,
'Bond' and 'Conveyance,' are declared by the interpretation clause,
sect. 4 (where there is nothing in the subject or context repugnant
to such construction), to extend to and include 'personal bonds for
'payment or performance, bonds of caution, bonds of guarantee, bonds
'of relief, bonds and assignations in security of every kind, decrees
'of any Court, policies of assurance, or of any Assurance Com-
'pany or Association in Scotland, protests of bills, or of promissory-
'notes, dispositions, assignations, or other conveyances of moveable or
'personal property or effects, assignations, translations, and retrocessions.'
By the same clause, the words 'Moveable Estate' extend to and include
'all personal debts and obligations, and moveable or personal property
'or effects of any kind.'

The object of the Act is to abbreviate and simplify the forms ordinarily made use of in the transmission of such documents or estate. For this purpose it is, by sect. 1, declared competent to any party in right of a 'personal bond' or 'conveyance of moveable estate,' to assign such bond or conveyance by assignation, apart from, or on the bond of conveyance, in, or as nearly as may be in, the forms set forth in schedules A and B annexed to the Act. Such assignation is declared registrable in the books of any Court, in terms of any clause of registration contained in the bond or conveyance assigned, 'and such assignation, upon being duly stamped and duly intimated, shall have the same force and effect as a duly stamped and duly intimated assignation, according to the forms at present in use.' By sect. 2, and Schedule C, short forms for the notarial intimation of an assignation are authorized. The clauses in the new forms will now be examined in their order.

¹ *Tayler*, 16th July 1847, 9 D. 1504.

² *Drummond*, 22d June 1492, M. 843.

CLAUSES IN
NEW FORM OF
ASSIGNATION.

1. The first clause in both forms simply states the name and designation of the grantor, and the cause of granting. It is in each form in these words: 'I, A. B., in consideration of, etc. (or otherwise as the case may be.)' This, you will observe, is similar to the narrative or inductive clause in the form of assignation heretofore in use, and first before examined.

2. The clause of assignation follows, and, in Schedule A, applicable to the assignation apart from the bond or conveyance, is in these words, 'do hereby assign to C. D., and his heirs or assignees (or otherwise as the case may be), the bond (or other deed, describing it) granted by E. F., dated, etc., by which (here specify the nature of the deed, and specify also any connecting title, and any circumstances requiring to be stated in regard to the nature and extent of the right assigned.)'

The words of the corresponding clause in Schedule B, applicable to the assignation written on the bond or conveyance, are, as nearly as the case admits of, the same with the above. This clause in each form, you will observe, is substantially the same as the clause of assignation in the form first before examined.

3. We have lastly, in both schedules, the testing-clause, which will be in usual form.

CLAUSES
OMITTED IN
NEW FORM.

The statutory forms omit the clauses surrogating and substituting the assignee in the full place, and with the full powers, of the cedent; also the clause of warrandice, clause of delivery of the bond, or other deed assigned, and the clause of registration; but (1.) The surrogation and substitution is clearly a legal consequence of the leading clause of assignation, and no case has suggested itself in which, upon the full transfer of such rights as fall within the operation of the Act, the clause of surrogation and substitution can be required. (2.) The warrandice clause can only be necessary where there is some specialty in the case,—for example, where the warrandice is not to be from facts and deeds, as it usually is. (3.) With regard to the delivery of writs, there are some cases, particularly where the bond or conveyance assigned is to be retained by the cedent, or delivered to the assignee subject to conditions, in which it will be necessary to introduce a clause, binding the cedent to make the bond or conveyance forthcoming to the assignee upon all necessary occasions; or, as the case may be, expressing the conditions under which the bond or conveyance is delivered to the assignee.

REGISTRATION.

(4.) With regard to registration, the Act merely gives the assignation the benefit of any clause of registration contained in the bond or conveyance assigned. If, therefore, the bond or conveyance does not contain a clause of registration, such clause ought to be inserted in the assignation, if written apart from the bond or conveyance. If written upon a bond or conveyance containing no clause of registration, it would seem to be of no use to introduce a clause of registration in the assignation, because registration in the record of probative writs can take place without such clause, and registration cannot competently take place in any other

record applicable to the registration of ordinary deeds, because, in all such other records, the principal deed recorded is retained as the warrant of the extract, and, in the case here supposed, the principal deed, being written upon the bond or conveyance assigned, cannot be left with the registrar.

The case of the assignation of the instrument of protest of a bill, or promissory-note, seems to require notice in reference to this provision of the Statute. Such instruments are registrable, not in terms of any clause of registration contained therein, but in virtue of special enactments by Parliament. In making out the assignation of such an instrument, there ought always to be inserted the ordinary clause, and procuratory of registration for preservation and execution, or its equivalent under the Titles to Land Act of 1860. This being done, the instrument of protest and assignation can be registered, if necessary, in the same Court books, the instrument in virtue of the Acts allowing such registration, and the assignation in virtue of its own clause of registration. But, in general, there is no need to register the assignation of a protest.

It seems also worthy of notice, that the Act immediately under consideration does not extend to the conveyance of the unconstituted balance due upon an open account, at least until such balance has already been the subject of a conveyance or assignation. After having been transferred by a conveyance or assignation in any competent form, it is clear that such balance can be again transferred by an assignation in either of the forms authorized by the Act. The words of the Act appear sufficiently broad to include in their operation the transfer of ships; but it will clearly be advisable, in general, to adopt for such transfer the forms authorized by the Merchant Shipping Act of 1854. These will be more fully referred to in their proper place.

As in the case of the other Conveyancing Acts which have been passed in and since the year 1845, the Act 1862 does not prevent the employment of the forms of deeds of transmission in use at its date. It is thus, strictly speaking, optional to take advantage of the Act or not; but it is clear that one or other of the new forms ought to be employed wherever it is suitable.

I will now offer some remarks on the clauses of assignations generally.

1. *The Narrative.*—This may consist simply of an acknowledgment of the receipt of a sum of money by the cedent from the assignee, or specification of the cause of granting, whatever that may be; or, in the first place, there may be recited the bond or other writing to be assigned, and then the cause of granting the new deed. The former is best in all cases where there is nothing very complex in the nature of the right to be assigned, or of the cedent's title. On some few occasions it may be necessary to introduce a narrative or recital of the grounds of debt, and the cedent's title, in order to prepare the way for a distinct clause of assignation. But, as a general rule, and more especially keep-

ing in view the object of the late Act, the form seems preferable which confines the introductory clause to its proper purpose, viz., the cause of granting. When that is done, the subject-matter of the deed is kept all together in the clause of assignation, which is its proper place; whereas, by reciting the vouchers of debt and cedent's title in the introductory clause, the proper assignation is made to refer to the narrative, as containing many important particulars of designations, dates, etc.; and, by this reference, the subject-matter is thrown into two clauses, and additional trouble given in adjusting and examining the deed. Of course there is also additional risk of error. As to this point, however, the practitioner must use his best discretion; keeping in view that next to accuracy comes perspicuity, which requires judicious arrangement, and, in general, will be greatly promoted by conciseness.

DEBT AFFECT-
ING ENTAILED
ESTATE PAID
BY HEIR OF
ENTAIL.

When a debt, affecting an entailed estate, is paid up by the heir of entail in possession, out of his own proper money, and is to be assigned to him, it will be advisable that the narrative clause of the assignation should distinctly show that the consideration-money is advanced by the heir from his own proper means, and in no respect from entailed moneys. This is advisable in order to exclude any plea of extinction of the debt, on the ground of confusion, or *concursus debiti et crediti*.

2. *The clause of Assignation.*—The new statutory forms, as well as the two older forms previously in use, have been already given. Of the older forms, the first, containing simple, direct words of assignation, appears preferable to the second, which consists of the appointment of a cessioner and assignee. Words importing assignation ought to be employed, but they do not appear to be indispensable. On this point, I refer you to the opinion of the Lord Justice-Clerk Inglis, in the case of Carter.¹ His Lordship was here speaking of an agreement between the parties entitled to one-half of a fund, consisting of money held by testamentary trustees, and creditors of said parties, by which it was agreed that the sum due to the creditors should be paid by the trustees out of said half of said fund; and the parties entitled to said half 'authorize and direct the trustees to pay over the said principal sum and interest accordingly, and declare that a receipt to the said trustees by the said payees for the same shall be as valid and effectual, to all intents and purposes, as if granted by the said whole parties,' etc. This document was intimated to the trustees as an assignation, so that the right was then complete, if the assignation itself was valid. It was pleaded that this clause of the deed did not constitute an assignation. His Lordship says, 'I cannot understand that plea, unless it is intended to mean that by the law of Scotland nothing but words of conveyance can operate an assignation. But, if anything is settled in the law of Scotland, it is that no words directly importing conveyance are necessary to constitute an assignation, but that any words giving authority or directions which if fairly carried out will operate a trans-

¹ Carter, 20th March 1862, 24 D. 933.

'ference, are sufficient to make an assignation; and, therefore, there 'is no doubt that we have here an assignation,' etc.

If the bond excludes executors, so will the assignation, if taken simply in favour of the assignee and his heirs, or of his heirs or assignees, or heirs and donators; but otherwise if taken to the assignee and his heirs and executors. EXCLUSION OF EXECUTORS.

Where an entail-debt, paid by the heir in possession out of his own proper money, is assigned to such heir, care should be taken to make the destination clearly distinct from that of the entailed estate.

In both of the older forms of the clause of assignation, when duly framed, the vouchers of debt, and all that had followed, or was competent to follow thereon, were in use to be specially assigned, as well as the debt itself; and, where the cedent was not the original creditor, he was in use to assign the titles by which he had acquired right. But, if the debt be assigned, the right to the writs whereby it is constituted and vested in the cedent, and all following or competent to follow thereon, will go with the debt, and belong to the assignee, although not specially conveyed to him; and where the charge on a bond was suspended on caution, and the letters found orderly proceeded, a special assignation of the bond, with all action and execution that had already followed, or was competent to follow thereon, was found to carry the bond of caution in the suspension, as part of what had followed on the principal bond.¹ In an early case, the heir of the original debtor had granted a bond of corroboration, and the creditor had thereafter assigned the debt with the original bond, but without either specifying the bond of corroboration, or saying 'with all that had followed on the original bond.' The bond of corroboration, however, had been delivered to the assignee. In these circumstances, the assignation was found to reach to the bond of corroboration as being delivered to the assignee.² ASSIGNATION OF WRITS.

The assignee will also be in the full right and place of the cedent, whether the words 'surrogating and substituting,' etc., are introduced into the deed or not. And the right to the debt, under the simple assignation thereof, will give power to uplift, assign, and discharge, without the special clause to that effect. It was so found in a case cited by Lord Stair.³ But, though these clauses are not legally necessary, it is expedient to insert them when not taking advantage of the new statutory forms, and to adhere in such cases to the approved style in use before the passing of the late Act. When the forms authorized by that Act are competently employed, of course they carry with them the benefit of the best-framed clauses in use in the older form.

We may here notice the Act of 1861, relative to the transfer of railway mortgages and bonds in Scotland:⁴—

§ 1. Any person or company, entitled to any mortgage or bond,

¹ Lyell, 11th March 1823, 2 Sh. 288.

² Cultie, 3d Feb. 1676, 2 Br. Sup. 197.

³ Stair, iii. 1. 4.

⁴ 24 & 25 Vict. c. 50.

TRANSFER OF
RAILWAY
MORTGAGES.

granted by a Scotch railway company, under its statutory powers, may transfer their right and interest therein, 'by signing on the back of such mortgage or bond an endorsement in the form prescribed by the 'schedule to this Act, or to the like effect:' provided that the said mortgage or bond, 'on the original making and issuing thereof, and before 'any transfer or assignment thereof, have been stamped with an amount 'of stamp-duty equal to three times the amount of the *ad valorem* stamp-duty chargeable thereon by law, and over and above the said *ad valorem* duty, and have been duly registered in the books of such company, 'in terms of the Companies' Clauses Consolidation (Scotland) Act, '1845.'

§ 2. 'Every such endorsement shall be exempt from stamp-duty, and 'shall have the same force and effect in all respects as the transfer of 'any mortgage or bond, by deed executed according to the form, and 'registered in terms of the provisions prescribed by the said Companies' Clauses Consolidation (Scotland) Act, 1845.'

SCHEDULE.—*Form of Endorsement.*—'I, A. B., of _____, transfer 'to C. D., of _____.—In witness whereof, I have subscribed this 'endorsement at _____ on the _____ day of _____ 'before these witnesses, E. F., of _____, and G. H., of _____.
'(Signatures of Witnesses.) (Signature of Endorser.)'

RIGHTS OF
ASSIGNEE.

In assignments of ordinary debts, the cedent can only convey the right as it stands in his own person, and subject, as against the assignee, to every exception pleadable by the debtor against the cedent, who cannot, by granting an assignment, place a new creditor in a better condition than himself.¹ The assignee can pursue in the cedent's name; and, in an old case, it was found he could do so even though the cedent prohibited the procurators, whom he appointed, to compare in his name.² Such a power, when not excluded, is clearly consistent with the old principle on which assignees were constituted procurators or mandatories of the original creditor, with power to uplift the debt for their own behoof. Strictly speaking, it was the original creditor who prosecuted, and it was the same thing to him whether his own name, or the name of the assignee, as his procurator, was made use of. Apparently, the same option ought not to subsist in cases where debts have been conveyed in the form of simple transferences; but, in practice, it is still allowed, and, where a cedent wishes to exclude the right, he ought to do so by an express prohibition in the assignment which he grants. Banks, in assigning debts, usually insert such a clause immediately after the general power to do everything which the cedent could have done, before granting the assignment; and, though there is no such practice, there seems equally good reason for the exclusion on the part of private parties. In the new statutory forms, the clause of exclusion would be introduced

¹ Cairnis, 3d July 1533, M. 827; Grant, 1st May 1818, 6 Dow's App. 239.

² Grier, 20th Nov. 1621, M. 828.

immediately after the clause of assignation. But the assignee cannot, even when no such clause is in the assignation, execute arrestments or pouding or other diligence in his own name, in virtue of a warrant in the cedent's name ;¹ because the messenger, who executes the diligence, is not considered qualified to judge of the import or validity of the assignation or other title. The assignee ought to apply by bill or petition to the Lord Ordinary on the Bills for diligence, of new, in his own name, which will be authorized as matter of course by the Bill-Chamber Clerk.

We have next in the older forms the warrandice clause, binding the cedent to warrant the debt from all facts and deeds done, or to be done, by him ; or, if the assignation be gratuitous, from facts and deeds to be done by him. The appropriate clause of warrandice is clearly comprehended in the new forms authorized by the Act of 1862.

As already explained, the warrandice from facts and deeds done or to be done imports that the cedent has not done, and shall not do, anything prejudicial to the right assigned ; and, in ordinary cases of onerous assignations, it is implied that the debt is due to the cedent. The warrandice from facts and deeds to be done imports only that the cedent shall do no voluntary act in prejudice of the right assigned.

The implied warrandice, applicable to the assignation of a debt where no warrandice is expressed, as well as the obligation of warrandice imported by the force of the late Act into the forms of assignation thereby authorized, will be to the same effect as above, in the respective cases of the assignation being onerous and gratuitous. And so also will be a clause of general warrandice. But in assignations of debts, neither the express, implied, or general warrandice, nor the warrandice comprehended in the statutory forms, imports the solvency of the debtor ; nor is that implied even by absolute warrandice, which, in such assignations, means no more than that the debt is due, that the bond or other deed assigned cannot be reduced, and that the cedent, and no other, has right to it ; so that the debtor cannot successfully defend in law when sued for payment. This, however, I am inclined to think, falls under the implied warrandice in the transaction when it is onerous. If the cedent, in place of transacting with a new creditor, obtains payment from the debtor, and grants a discharge, absolute warrandice of his title is given as matter of course, or is implied ; and the cedent, in an assignation, ought to be in no better condition as regards his own title. He holds himself out as the creditor, enters into an onerous transaction on that footing, and ought to be liable to support his own title.

A creditor whose debt is to be paid is not bound to grant an assignation in place of a discharge, when his granting the assignation may be prejudicial to himself.² In Russell's case, a security had been granted in usual form over lands belonging to a liferenter and fiar ; questions were threatened as to the capacity of the fiar to grant the deed, which was con-

¹ Stewart, 5th June 1745, M. 834 ; Kyle, 12th June 1813, F. C.

² Russell, 28th Nov. 1857, 20 D. 125.

sequently exposed to the risk of objection as far as it affected the fee of the subjects of security; the creditor entered into possession, and was in course of recovering his debt out of the rents belonging to the liferenter, his security and preference over which were clear and unexceptionable. Meantime the lands were sold by a postponed creditor, who offered payment to the first creditor, on his granting an assignation, with the usual clause of warrandice. The first creditor, however, was found not bound to grant warrandice importing generally that the debt was due by the granters of the bond. That would have implied that the fiar as well as the liferenter had validly granted the bond. The creditor was held bound only to place the purchaser in his own exact position, and to warrant that the amount of the debt had been truly advanced by him at the date of the bond, and remained due to him at the date of the assignation. This would just have been the extent of his warrandice, if he had granted a discharge to the debtor on payment.

The result of the obligation of warrandice is different when the transaction is not onerous; but, though a debt is assigned in consideration of less than its nominal amount, the warrandice, if not qualified, will extend to the full amount of the debt, not merely the sum paid for the assignation. If, therefore, limitation of the warrandice is intended, there ought to be a special clause in such assignation, whether the statutory or any other form be employed, expressing the particular agreement of the parties. This point was noticed when considering the general subject of warrandice. In a case where a debt had been assigned in consideration of a sum less than its nominal amount, and warrandice was granted against the facts and deeds not only of the cedent, but of his author, the cedent's liability was held not limited to the sum paid him for the assignation, but to extend to the full amount of the debt assigned.¹ The subject assigned, and with reference to which the obligation of warrandice is undertaken, is the debt, and not the sum paid for it. The special clause of limitation is therefore necessary in order to qualify the claim of recourse upon eviction.

If it is intended to guarantee the solvency of the debtor, a special obligation to that effect is necessary. But the granter of the special guarantee ought, for his own protection, to reserve to himself power to take measures at any time for obtaining security for his relief, or for enforcing payment to the assignee; otherwise he is just a cautioner without the benefit of the septennial limitation, without bond of relief, and without any means of freeing himself of his obligation of guarantee.

**DELIVERY
OF WRITS.**

We have next to notice the clause of delivery of writs, the purpose of which, when the writs relate only to the debt assigned, is to operate a receipt to the cedent for these writs, which, in that case, will all be delivered up by him to the assignee. If the whole writs are delivered, the clause will say, simply, that the bond and whole other writs before specified have been delivered; as all the writs are usually detailed in

¹ Houston, 22d Feb. 1717, M. 16,619.

the preceding clauses. If, however, the whole cannot be delivered, or if any of those delivered contain matter beyond the debt assigned, the clause will show with whom, respectively, the custody of the writs common to both parties is to remain, and will contain an obligation on the cedent, or on the assignee, as the case may be, to make the writs not delivered, or those delivered and which relate to more than the subject of the assignation, forthcoming when required by the one party or the other. In such case, there must be a correct specification of the writs to which the obligation for exhibition relates. In general, it will be advisable, when the separate interests in any deeds are of importance, to register such deeds for preservation. The writs, however, relating exclusively to the debt assigned, belong to the assignee, who is entitled to possession of them, without any express obligation to deliver them up to him;¹ and, so far as the writs assigned contain other matter, the cedent (or assignee, as the case may be) is clearly entitled to exhibition on necessary occasions, without special obligation to that effect.²

The clause of registration is for preservation, or, if necessary, execution; and if the short form of this clause, authorized by the Titles Act of 1860, be used, the execution will be on six days' charge. Where the old and longer form of clause was employed, it was not usual to consent to a six days' charge, because the registration of assignations is not intended to authorize summary diligence as for a liquid sum. The holder can proceed only by an ordinary action, on the warrandice, for making good loss or damage in case of eviction, and for that purpose registration is not necessary.

REGISTRATION
CLAUSE.

CHAPTER II.

THE assignation, when executed, requires of course to be delivered to the assignee; and the rules with respect to the delivery of deeds in general, as formerly explained, and likewise on the subject of equivalents to delivery, may be here simply referred to. There is nothing exceptional or peculiar on these points in connexion with assignations of debts or other personal or moveable estate.

INTIMATION OF
ASSIGNATION.

I will presently notice certain subjects besides debts which may be conveyed by assignation, or as to the assignation of which cautions seem necessary; likewise the form of assignations in security. But, before entering on these departments of this subject, it will be convenient to consider what is necessary, besides delivery of the assignation, to complete the title of the assignee to a debt, and to divest the cedent. I refer to the Intimation of the assignation, which requires to be given to the debtor or obligant in the debt assigned.

¹ Finlaw, 25th June 1670, M. 6544.

² Reid, 24th Nov. 1857, 20 D. 83.

INTIMATION OF
ASSIGNATION.

The principles on which intimation completes, and is necessary for the completion of, the assignee's title, are instructively discussed by Professor Menzies,¹ who shows that, agreeably to the ordinary rules which require possession, actual or constructive, in order to perfect the transference of property from one to another, intimation, in the case of a 'chase in action,' is considered tantamount to obtaining delivery or possession. This doctrine was held by Craig, who says, '*Civilis quædam possessio per intimationem concurrit.*' To the same effect the Court of Session² speak of the necessity of an assignee intimating his assignation to the debtor, and so constituting him the assignee's debtor; and the English Judges³ say (as speaking to the assignee), You must place 'every person who has an equitable or legal interest in the matter under 'an obligation to treat it as your property. For this purpose you must 'give notice to the legal holder of the fund. In the case of debt, for 'instance, notice to the debtor is tantamount to possession.'

The assignee then, you will observe, must constitute the debtor as his debtor. He must place all concerned under an obligation to treat the debt as his property. The cedent personally is under such obligation, by having granted the assignation. The debtor, however, does not necessarily know anything of that document or transaction. It relates to a debt due by him, but he is not a party to it; and there is no register for publication of the transfers of mere personal obligations. Without intimation, therefore, to him, matters remain, as far as he is concerned, just as before. He stood bound to the cedent, and knows of no change. But, by the conception of his obligation, he is expressly bound to pay to the cedent, or his assignees; or, if the bond or debt is not expressly payable to assignees, the law (in the case of an assignable debt) will supply these words, and the debt is equally payable to the cedent or his assignees. The new creditor, as the assignee, is thus the proper payee; and all that is wanted is to certify the debtor of that fact in due form. This is done by making intimation to the debtor of the assignation. The assignee exhibits that document, and says to him, 'You were bound to pay to the cedent or his assignees. I am his 'assignee, and am now the payee, as much as if the bond or debt had 'been originally payable to me.'

The intimation is thus, on ordinary legal principles, enough to place the debtor under obligation to pay to the assignee, and to regard him and no other as the payee. It is just like the draft or order by a creditor on his debtor in a cash-balance. Such balance being payable to the creditor or his order, the debtor is bound by law, after the order is presented to him, to pay to, or hold for, the payee in the order, and no one else.

Then, as to third parties, they can claim through the cedent

¹ Menzies, p. 248, *et seq.*

² Wallace, 22d January 1663, M. 837.

³ Ryall v. Rowles, referred to in Jarman and Bythewood's Conveyancing, vol. v. 461.

only. But what he has is only the debtor's obligation to pay to him. So long as the debtor's obligation to pay to him subsists, his (the cedent's) creditors, or others deriving right through him, can attach, or be made assignees of, that obligation. But, as soon as the obligation to pay to him (the cedent) is terminated, there is nothing remaining which can be taken or obtained from him. We have seen that the intimation of the assignation to the debtor substitutes the assignee as the creditor in the full right and place of the cedent, and terminates all obligation to pay to the cedent; and supposing any creditor of the cedent, afterwards, to attach the debt in the hands of the debtor, as if still due to the cedent, the answer would be,—the cedent is divested, and I, the debtor, am now bound to pay, not to him, but to the new creditor, the assignee. In like manner, a second assignation in the circumstances would transfer nothing.

These views may be illustrated by reference to the following cases :—Thus, where an assignation had been granted, but not intimated, the debtor in good faith paid the debt to the original creditor; such payment operated a good and effectual discharge to the debtor.¹ Moreover, where two parties, respectively, have claims against each other, the one party can plead his claim by way of compensation or set-off against the claim of the other; but the plea of compensation does not arise if the claim founded on by the one party consists of a debt which has been merely assigned to him, and the assignation not yet intimated. The assignee's title to the debt in such circumstances is imperfect, and, until the assignation is intimated to the debtor, the assignee is not the creditor in the debt, to the effect of compensating the counter debt due by him; and such assignee, if he does not intimate the assignation in his favour before the debt due by him is assigned to a third party, and the assignation thereof intimated to him, cannot thereafter plead compensation at all.²

These cases show that the intimation is necessary, not merely for placing the debtor *in mala fide*, but for completing the assignee's title; and, moreover, as no one can be fully divested of a debt until another is invested, we shall find that intimation is necessary for divesting the cedent, and has long been so regarded by the law of Scotland. Craig says that, if a right of reversion has been assigned to two different persons, that one who has first intimated his right shall be preferred; and it has been so found in many cases.³

Further, when the cedent has died, an unintimated assignation granted by him is preferable to the right of his ordinary executor, supposing that no creditors are competing.⁴ But confirmation of a debt, as

¹ M'Gill, 4th July 1558, M. 843; M. 2652; and Barham, 29th Nov. 1733; M'Dowal, 8th June 1714, M. 840. Elchies, *voce* Compensation, No. 2.

² Drummond, 22d June 1492, M. 843; Lord Rollo, 4th Feb. 1665, 1 Br. Sup. 510.

³ Wallace, before cited, 22d Jan. 1663, M. 837; see also Ferguson, 12th Dec. 1665,

⁴ Thome, Dec. 1863, 2 Br. Sup. 49.

INTIMATION
NECESSARY TO
DIVEST CEDENT.

INTIMATION OF
ASSIGNATION.

forming part of the estate of the deceased cedent, expedite by an executor-creditor of such cedent, is preferable to the right of the cedent's assignee under an unintimated assignation.¹ The reason is, that the ordinary executor of the deceased cedent is just the representative of the deceased, and can take nothing in preference to a third party to whom such cedent had assigned the debt. But the executor-creditor is also a third party; his confirmation is equivalent to completed diligence in his favour, but yet even such diligence could take nothing from the cedent, or as being part of the cedent's estate, if the cedent had been divested by the mere assignation.

Another case may be cited as showing strongly the necessity of intimating whatever is necessary to perfect the assignee's right. An 'assignation, revocable, though duly intimated, and the power of revocation afterwards renounced, was postponed to a posterior assignation, for onerous causes, also intimated, in respect the discharge of the power of revocation was not intimated.'² But, upon intimation of the deed or deeds by which the assignee is substituted in the place of the cedent, the assignee makes the debtor bound to pay to him. The assignee has become the creditor, and fully vested in the debt; the cedent is thereby divested, and his creditors or subsequent assignees, having claims only through him, are excluded.

We have seen that a second assignation, duly intimated, is preferable to the first assignation, not intimated; on the other hand, the debtor, if after intimation he pays to the original creditor, is liable to pay a second time to the assignee. Payment, in such circumstances, is made to the wrong party, and is no payment of the debt which has been assigned.³ To delay intimation, therefore, might lead to a claim of damages on the assignee's part against the party whose duty it was to intimate. A claim by the assignee of a bond was sustained against the heir of a law-agent, for the loss upon a loan of £1000, negotiated twenty-five years previously, on the ground that such loss arose from the omission of intimation which was necessary to complete an assignation.⁴ In many cases there may be no risk of double assignations; but, in transacting business connected with loans, the only rule consistent with safety and comfort is to see the security at once, and without delay, completed in all particulars. This is the more important, from the terms of the Bankrupt Act of 1856,⁵ which, in conformity with some earlier Acts, now superseded, declares that the act and warrant of confirmation in favour of the trustee shall *ipso jure* transfer to, and vest in, him for the creditors of the bankrupt, as at the date of the sequestration, the moveable estate of the bankrupt, so far as attachable for debt, to the same effect as if actual delivery or possession had been obtained, or intimation made at that date. In case of the cedent's bankruptcy, therefore, there will be

¹ Sinclair, 5th July 1726, M. 2793.² Crockett, 22d Jan. 1743, Elchies, voce Assignation, No. 5.³ Hope, 12th June 1816, F. C.⁴ Lillie, 13th Dec. 1816, F. C.⁵ 19 & 20 Vict. c. 79, s. 102.

no opportunity allowed for remedying a previous omission. If the assignation has not been intimated before the act and warrant of sequestration is issued, the trustee's right being by the force of the Statute first completed, the previous assignee will be excluded. Lillie's case also shows the necessity of preserving evidence for instructing the fact of intimation.

Lord Kames says¹ that the 'intimation must be in the cedent's name, as the assignee has nothing to say to the debtor, but *qua* procurator;' and, in an anonymous case,² it was found enough that the cedent himself, and not the assignee, gave the intimation. But the deed to be intimated is the assignee's. He is the party interested in completing his own title; and though, no doubt, intimation given in due form by the cedent, and proved in writing, would be good and effectual, the proceedings heretofore in use to be adopted in intimations have been always, and in strictly correct principle, in name or on behalf of the assignee.

The intimation may be made notarially; and, if so, either in virtue of a short and simple form authorized by the Act of 1862, or in the form previously in use; or without the intervention of a notary, by producing the assignation to the proper party, delivering a copy to him, and obtaining from him a probative acknowledgment that the assignation has been intimated; or, in virtue of the Act, by sending to the proper party a certified copy of the assignation through the post-office, and obtaining from him a written acknowledgment of the receipt. Indeed, the intimation may be made in any way which brings the knowledge of the assignation home to the debtor, provided always that proof of the fact can be adduced. When given notarially, the proceeding in use before the passing of the Act of 1862 was as follows:—

A procurator for the assignee (whose power of procuratory was duly constituted by the lawful possession of the assignation), together with a notary-public and two witnesses, attended the debtor, the procurator having in his hands the assignation. The procurator, in presence of the notary and witnesses, exhibited to the debtor the principal assignation, stated its terms, and delivered to him a full and complete copy, attested by the notary as correct; stated that, as procurator, he intimated the assignation to the debtor, and protested that he (the debtor) should hold the same duly and legally intimated, should not pretend ignorance thereof, or of the intimation, and should not make payment to any other than the assignee, or those in his right; and that, if the debtor should do in the contrary, he should be liable to pay to the assignee not only the amount of the debt, but also damages and expenses. Thereupon the procurator took instruments in the notary's hands, by presenting a piece of money to him; in other words, he asked the notary to make out a formal notarial instrument recording what had been done. These statements were all inserted in a schedule, running in name of

¹ Kames' *Elucidations*, p. 319.

² *A. v. B.* 25th Jan. 1540, M. 843.

INTIMATION OF
ASSIGNATION.

the procurator, and which specified the place and date of the intimation. The schedule, of which a form is given in the Style Book,¹ was signed by the procurator and notary-public on each page; and was delivered to, and left with, the debtor; or, if he could not be found personally, it was left at his dwelling-place. The notary thereupon made out a notarial instrument of intimation, containing a record of all that had taken place, agreeably to the words of the schedule. This instrument was signed by the notary on each page; the witnesses also signed each page, because they attested the facts set forth, and they added the word 'witness' to each subscription. The instrument so completed, of which a form is given in the Style Book,² was legal evidence of the intimation.

If the notarial form was not adopted, the ordinary mode of proceeding was to produce to the debtor the principal assignation, deliver to him a copy, and take from him an acknowledgment of intimation; this was usually written at the end of the principal assignation, and, in such case, might be in these words:—'I, A., designed in the foregoing assignation, hereby acknowledge that the said assignation was this day duly intimated to me, and I dispense with all other or more formal intimation.' If the acknowledgment was holograph, the debtor would add his subscription, with the place and date of subscribing, and, in such case, no witnesses were required; the holograph acknowledgment of intimation of an assignation having been found (unlike other holograph writings) to prove its own date.³ There had been a previous decision of the House of Lords, sustaining intimation, instructed by holograph letters exchanged between the assignee and debtor.⁴ And in Newton and Co.'s case the decision proceeded on the ground of universal usage. If the writing was not holograph, it required to be authenticated in all respects like a formal deed. This would be the case when two or more parties signed the same acknowledgment. It is advisable that the same formality should now be observed with reference to the 'written acknowledgment' required by the Act of 1862, when intimation is made by sending a copy of the assignation through the post-office.

NEW FORMS.

The Act of 1862, by sect. 2, authorizes new forms and procedure for notarial and private intimation, but without abolishing the older forms, which still remain available in the option of parties. With reference to notarial intimation, the Act declares that an assignation shall be validly intimated by a notary-public delivering a copy thereof, or, if the deed containing the assignation shall likewise contain other conveyances or declarations of trust-purposes, a copy of such part thereof as respects the subject-matter of such assignation, certified as correct, to the person or persons to whom intimation may be requisite; and that a certificate by such notary-public, in the form set forth in schedule C, shall be sufficient evidence of such intimation having been duly made. By the certificate,

¹ Juridical Styles, ii. 351.² *Ibid.* ii. 352.³ Newton & Co., 23d Nov. 1785, M. 850.⁴ Gray, 10th March 1708-9; Robertson's App. 1.

the notary attests and declares that, upon a specified day, and between specified hours, he duly intimated the assignation to the party, by delivering to him personally, or (as the case may be) by leaving for him within his dwelling-house, the situation of which is to be specified, in the hands of a party to be specified, a full copy of the assignation; or, if a partial copy, he will quote the portion of the deed which has been delivered, to be given to the party. The notary will further certify that the whole of the above procedure was done in presence of two witnesses, whom he will name and describe, and who will subscribe the certificate along with him. The certificate, which closes with a testing-clause in the form applicable to probative deeds, will be subscribed by the notary and witnesses.

The certificate can be written upon the assignation, or apart from it, as may be most convenient. By the direction, that, if a partial copy is delivered, the notary is to 'quote' the portion delivered, it does not seem intended that a full copy of such portion is to be embodied in the certificate, but only that such portion should be described and pointed out so as to show plainly and fully what it consists of. What is wanted appears to be such a specification as is required by the Titles to Land Acts of 1858, sect. 3, and 1860, sect. 5, in making use of a clause of direction. The witnesses, it will be observed, attest the whole facts set forth in the certificate, as well as the notary's subscription.

In the case of private intimation, the holder of the assignation, or any person authorized by him, is to transmit a copy of the assignation, or a partial copy of the deed containing it (as in the case of the notarial intimation), certified as correct, by post, to the person or persons to whom intimation may be requisite, and a written acknowledgment by such person or persons of the receipt of such copy is declared sufficient evidence of such intimation having been duly made. The Act gives no direction as to the party who is to certify the correctness of the copy, or partial copy, of the assignation or other deed, to be delivered or transmitted as above. It may, in general, be as well for the person who delivers or transmits the copy to certify its accuracy, but this does not seem to be indispensable. It would seem to be enough that the person who certifies should be one competent to attest the fact of the accuracy of the copy.

Where the debt assigned is due by two or more persons, the assigna-
DEBT DUE BY
SEVERAL
DEBTORS.
tion ought to be intimated, in one or other of the ways above pointed out, to each of such persons just as if he was the sole debtor. Such intimation would be absolutely necessary for the assignee's own safety, in cases where the debtors were not bound jointly and severally. But, even where they are so bound, the separate intimations should be given, so as to place the new creditor in the full right of the debt as against each of them, and prevent any of them *in bonâ fide* paying to the wrong party. Where the debt is due by a principal debtor and his cautioners, intimation to the principal debtor has been found a sufficient intimation

INTIMATION OF
ASSIGNATION.

to the cautioners likewise.¹ But the case of principal and cautioner is peculiar, the cautioner's being only an accessory obligation; moreover, no cautioner ought to pay without distress and intimation thereof to the principal debtor, or seeing the principal called for his interest; when that course is adopted, the practical sufficiency of the intimation to the principal, as for all concerned, is manifest. But even in the case of principal and cautioner, it would be imprudent to omit giving full notice to each party. Where the intimation was given to the cautioner only, and not to the principal debtor, the latter was found *in bona fide*, notwithstanding, to make payment to the cedent, and such payment liberated both himself and the cautioner.²

TO HUSBAND.

Where a married woman is the debtor, intimation ought to be made both to her and to her husband. A question on this point was raised, but not decided, in the case of Lord Ross.³ But there can be no doubt on the subject, as by the marriage the husband has become debtor, or, at least during the subsistence of the marriage, is liable to be called on for payment. The case is different where the assignation is intimated prior to the marriage. The husband's liability arises only by the marriage, and, the assignee's right having been completed previously, such liability is from the first to the assignee alone.

DEBTOR FURTH
OF SCOTLAND.

The Act of 1862 makes no special provision for cases where the debtor is furth of Scotland, and it may be the safest and most advisable course, that in such cases the intimation should be given notariaily at the Office of the Keeper of Edictal Citations, in the form previously in use, and in the mode established by the Act 6 Geo. IV. cap. 120, sect. 51, and relative Act of Sederunt, 24th December 1838. The Act of 1862, however, is expressed in broad terms, and it can hardly be doubted, that if a qualified notary-public actually delivers to the proper party, wherever he may be, a copy of the assignation certified as correct, or leaves such copy for the proper party at his dwelling-house wherever that is, and otherwise observes all the forms prescribed by the Act of 1862, as applicable to notarial intimation, the assignation will be held as duly and sufficiently intimated. And it is thought to be even more clear that the provisions of the Act of 1862, applicable to intimation without the intervention of a notary-public, can be made available wherever the person to whom the intimation ought to be made may reside, by adopting the procedure authorized by the Act with reference to intimation in this latter mode.

PUPIL AND
MINOR DEBTORS.

In the case of pupil or minor debtors, the intimation ought to be made to the pupils or minors themselves personally, or at their dwelling-places. This ought to be done notariaily. If there are any known tutors or curators, the like intimation ought to be given to each of them, in one or other of the forms before referred to. There ought, further, to be edictal intimation to the tutors and curators generally, at the Office of

¹ Mosman, Feb. 1670, 2 Br. Sup. 457.² Lyon, 23d Feb. 1610, M. 1786.³ Lord Ross, 20th Dec. 1682, 2 Br. Sup. 28.

the Keeper of Edictal Citations; and this last-mentioned intimation must clearly be in the old form, the Act of 1862 having no clause which can embrace it. Intimation to tutors and curators used formerly to be given at the head burgh of the county of the pupil's or minor's residence, but that proceeding is now abolished by the Act 13 & 14 Vict. cap. 36, sect. 22. When the pupil or minor is furth of Scotland, the intimation, both to him and to his tutors and curators generally, should be given edictally in the old form. If any known tutor or curator is furth of Scotland, he likewise ought to receive intimation; and what has been already said, in reference to intimations to debtors furth of Scotland, will be kept in view in regard to this case also.

In all cases of edictal intimation of assignation, the procedure must be gone through notarially; and, where the parties are furth of Scotland, letters of supplement under the Signet are required. A form of these will be found in the Style Book.¹ The letters, as there given, appoint service to be at the Record Office of the Keeper of the Records of the Court of Session, being in conformity with the Act of George IV., before cited; but that office has been abolished, and the service now takes place at the Office of the Keeper of Edictal Citations, as provided by the Act of Sederunt, also before cited. In the case of intimation given edictally under letters of supplement, a messenger-at-arms takes the place of the procurator; the Queen's letters being directed to messengers-at-arms as sheriffs in that part. The notary and witnesses accompany the messenger, as in an ordinary case they accompany the procurator.

There are still several other cases as to the mode of intimation requiring to be noticed. Where an incorporated hospital is the debtor, intimation of an assignation ought to be given to the treasurer of the incorporation.² This decision is said to have been pronounced after inquiry made into the mode followed in practice of using arrestments, and intimating assignations of corporation debts. When a corporation has no treasurer, and, it may be, for other reasons, intimation may sometimes have to be given to other officers. As a general rule, more than enough should be done, in order to make the assignation secure, rather than that any risk should be run of what is done being insufficient. In the case of incorporated and joint-stock banks not registered in terms of the Joint-Stock Companies Act 1856, Banking Companies Act 1857, or 'The Companies Act, 1862,' the principal officer at the head office appears to be the party to whom intimation ought to be given; because arrestments of money in the charge of such banks, even though in the hands of sub-agents, require to be used in the hands of the principal officer at the head office. But, where the money is actually lying at the sub-office, it would seem advisable that the intimation should be given to the agent or manager there, as well as to the principal officer at the head office. In the case of companies registered under 'The Companies Act, 1862,' the intimation may be given by leaving the same, or sending it through

¹ Juridical Styles, iii. 280.

² Keir, 10th Jan. 1739, M. 738 & 850.

INTIMATION OF
ASSIGNATION.TO TRADING
COMPANIES.

the post in a prepaid letter, addressed to the company at their registered office. The provisions in this respect of the Joint-Stock Companies Act of 1856¹ were slightly different, but this last-mentioned Act is now repealed. In the case of ordinary trading companies, the intimation should be made to the company *socio nomine*, at their principal place of business, and likewise to each of the individual partners, as far as they are known, personally, or at their respective dwelling-places; or to a manager, acting under a regular appointment for the company, if there is one. It is not enough to supersede the necessity of intimation to the partners, that the assignee is himself the managing partner.² An intimation to two clerks, who were also managers of a trading company, a minute whereof was entered in the company's books, was found fully to divest the cedent.³ But the circumstances of the case are not stated in the report; and wherever the partners are known, intimation should be made to each of them.

I will now advert to one or two decisions connected with intimations in the old form which seem to require notice. It has been found that the assignation must be produced at the intimation; and the instrument, or execution, will be ineffectual, if it do not bear that it was so.⁴ It has been found a nullity that the same person who was procurator was also notary.⁵ The procurator is, in law, the same as the assignee, and it is plain that the official duties of the notary, as called to attest what the assignee or his procurator does, make it impossible for him to represent the assignee. In competitions, more strictness in regard to intimation is requisite than where the debtor only is concerned. Thus, in a competition between two assignees, the intimation first made was defective, as not containing precisely the sum assigned, nor making mention of the cedent, nor of the assignation, nor *causa debendi*; and it might have been applied to any other right as well as to the debt claimed. The Court found that, whatever the intimation might operate against the cedent, yet in a competition with another onerous assignee it was too general and uncertain, and they preferred the competitor whose intimation, though latest in date, was distinctly applicable to the debt claimed.⁶ No such objections as those which have just been noticed can arise when one or other of the forms of procedure authorized by the Act of 1862 is competently adopted.

In some cases of competition, it has been found important that the instrument should state the hour at which the intimation was made.⁷ The notarial intimation authorized by the Act of 1862, it will be observed, specifies the hours between which the intimation is made. In regard to notices to individuals, intimation left for a merchant at his shop, he himself not being there at the time, is not sufficient.⁸ In Cleland's case, re-

¹ 19 & 20 Vict. c. 47, s. 53.

² Hill, 7th Feb. 1846, 8 D. 472.

³ Watson, 19th Nov. 1755, M. 850.

⁴ Watson, 9th Dec. 1714, M. 3687.

⁵ Scot, 3d July 1623, M. 846, and 1 Br. Sup. 262.

⁶ Lawrie, 17th June 1696, M. 849.

⁷ Spottiswoode's Prac. p. 76; Cust, 8th March 1775, M. 2795.

⁸ Cleland, 29th Jan. 1686, 3 Br. Sup. 379.

ference was made to a decision pronounced about twelve months previously (but not quoted by name), in which the execution of a summons against a Writer to the Signet was found null, because only left at his writing-chamber. The nullity in the case of the summons appears to have been founded on the Act of Parliament,¹ which requires the citation on a summons to be given to the defender either personally or at his dwelling-house. Though there is no Act to the same effect in regard to the intimation of an assignation, it seems reasonable to hold the rule for the one applicable to the other case; as in both the object is to secure, in the best way, the personal knowledge of the party interested.

On the subject of these intimations generally, I have to remark that the utmost care should be employed actually to reach the proper parties, and to preserve evidence of the fact of intimation to them. Besides, therefore, following out the regular forms notarially when an acknowledgment of intimation cannot be obtained, it would be well, as an additional precaution, where parties are furth of Scotland, or there is any doubt of the formal intimation having actually reached them, to send letters to them containing notice of the assignation and intimation; and to give notices in like manner to any parties in this country known to act for or represent the persons who are abroad. In the case of incorporations, joint-stock companies, or private companies, an endeavour should be made to get the intimation entered in the minute-book or other books of the concern, and a certificate of the fact of such entry officially communicated.

There are noticed in our books a variety of equivalents to formal intimation, and cases in which formal intimation has been found unnecessary for completing the assignee's title. To some of these I will now shortly draw your attention.

In the first place, action raised and executed at the instance of the assignee against the debtor, for payment of the debt assigned, is sufficient intimation of the assignation of such debt.² The production by the assignee of his assignation, in a process of multiplepounding raised by the debtor,—that is, an action raised by the debtor against several parties, each claiming the same fund or subject,—is also equivalent to formal intimation of the assignation to the debtor.³ The execution of an inhibition against the debtor, though founded on the debt assigned, has been found not to amount to intimation of the assignation;⁴ the reason stated being that 'the inhibition, not being *specific* execute and intimated to the debtors, could not be reputed an intimation to them.' Probably, therefore, if the inhibition fully narrated the assignation, and was served by a full copy upon the debtor personally, it would be held as a good intimation; but that should not be trusted to. The debtor's private knowledge has different effects as regards himself, and where third parties are concerned. He himself may be committed by such knowledge,

EQUIVALENTS
TO INTIMATION.DEBTOR'S
PRIVATE
KNOWLEDGE.¹ 1555, c. 33.² Whyte, 22d March 1622, M. 854.³ Dougall, 17th Nov. 1795, M. 851.⁴ Westraw, 14th March 1626, M. 859.

EQUIVALENTS
TO INTIMATION.

but it would be wrong in principle to allow the rights of third parties to be thereby affected. In a case where, there being no competing creditor in the field, the assignee had, first by letter to the debtor, signified his right, and thereafter shown the assignation to the debtor, without any further intimation,—the debtor, though he had subsequently paid to the cedent, was held liable to the assignee.¹ But, notwithstanding a verbal communing between the assignee and the debtor, yet, no promise of payment being alleged, it was found that the debtor was not even *in mala fide* to pay to the cedent.² And, where third parties are concerned, private knowledge, however it may affect the debtor personally, will not operate, without intimation, to give the assignee a preference in competition with subsequent arrestments duly used, or with assignations intimated.³ The debtor's mere subscription as witness to the deed containing the assignation is not equivalent to intimation. The witness to a deed, you will recollect, attests no more than the subscription of the party, and, as a general rule, knows nothing of the contents of the deed.⁴ There are numerous cases to that effect. But, when the assignation was contained in a deed to which the debtor was a party, it was found sufficiently intimated to him. As a party, he knew, or was presumed to know, the contents of the deed.⁵ Payment of interest by the debtor to the assignee is an acknowledgment by the debtor that the assignee is in right of the debt. In other words, such payment proves that intimation has been made.⁶

INTIMATION TO
FACTOR OR
AGENT.

As a general rule, it is not sufficient to give the intimation to the debtor's factor. But in a somewhat special case such intimation was held sufficient. Certain parties purchased one of the estates in Scotland forfeited on account of the owner's accession to the Rebellion of 1715, the purchasers holding the estate for behoof of the former owner's son and heir. They appointed a gentleman to the general charge of the property, who carried on the whole management, and kept a record of his transactions, which was patent both to the trustees and to the beneficiary. The trustees borrowed money on bond, which was called up by the creditor and advanced by a new creditor. Notice of this was given by the agent of the cedent to the factor for the trustees, who was requested to pay the past due interest to the cedent, which he did. He entered the payment in his cash-book, with a memorandum that the debt was from thenceforward conveyed to the assignee; and he afterwards gave notice of this memorandum to the beneficiary. Creditors of the cedent subsequently arrested the debt in the hands of the trustees, and the House of Lords (reversing the ultimate judgment of the Court of Session) preferred the assignee to the arresting creditors of the cedent; that is, they held

¹ Leith, 16th Feb. 1703, M. 865.² Faculty of Advocates, 25th July 1718, M. 866.³ Adamson, 15th June 1624, M. 859.⁴ Murray, Nov. 1622, M. 855.⁵ Creditors of Lord Ballenden, 28th March 1707, M. 865; Turnbull, 12th June 1751, M. 868.⁶ Livingston, 16th November 1626, M. 860.

that the assignation had been sufficiently intimated.¹ A letter, written by an assignee to the debtor, with his answer, craving delay for payment, was sustained as sufficient intimation.² It is also enough if letters to the above effect pass between the agents of the parties duly authorized. In a case where personal estate situated in Scotland, but belonging to a party domiciled in England, was validly conveyed by a deed executed according to the law of England, the execution of the deed was intimated on behalf of the assignee by letter from his law-agents to the debtor, and its terms were set forth with sufficient distinctness in their letter. The agents of the debtor replied, acknowledging the letter, which contained the terms of the assignation, and said there would be no need of compulsitor to obtain payment to those having a good title. The assignation was held duly intimated.³ Here the agents were duly authorized, and acted under the immediate instructions of their constituents, who were on the spot. In that case, the parties judicially admitted that, by the law of England, where the cedent and assignee were domiciled, the assignation was a valid deed, and sufficient to convey the fund in dispute; and further, that intimation was not necessary to complete the right given by said deed, so as to render it effectual within England in competition with any other right. In these circumstances, Lord Rutherford held that the assignation ought to carry even Scotch personal property without being intimated in Scotland. The Court found it unnecessary there to decide that point, but they have since found that a question of competition of diligence for a Scotch fund, even where one of the parties claims upon an assignation in the English form, entered into by parties domiciled in England, is to be determined by the law of Scotland, which requires intimation of the assignation to the debtor or holder of the fund assigned.⁴

The question, whether it is sufficient to intimate an assignation to the confidential man of business of the debtor, when the debtor himself is abroad, was raised, but not decided, in the case of Dougall, already referred to. The man of business in that case held no commission from the debtor, but was employed by him in the management of all his affairs in this country, and, about three months after receiving the intimation, he apprised the debtor by letter, that the debt had been assigned. It appears that the Court were in favour of the sufficiency of the intimation, but they had no occasion to determine that point.⁵ Such a mode of intimation ought not to be relied on, unless the agent has special power to receive it. In an early case, where there was only a letter written to the debtor, it was found there was not sufficient intimation.⁶ In Wallace's case, the Lord President Boyle speaks of this as not a general rule. But the mere writing of a letter to the debtor ought not

¹ Earl of Aberdeen, 9th April 1730, 1 Craigie and Stewart's App. 44.

² M'Gill, 22d Jan. 1630, M. 860; Gray, 10th March 1708-9. Robertson's App. 1.

³ Wallace, 27th May 1853, 15 D. 688.

⁴ Donaldson, 5th July 1855, 17 D. 1053.

⁵ Dougall, Bell's Folio Cases, p. 41.

⁶ Bain, 29th Nov. 1679, M. 863.

EQUIVALENTS
TO INTIMATION.

to be relied on in any case. A probative acknowledgment of receipt of the notice should always be got from him.

PRESENTMENT
OF BILL.

We have a familiar case of another equivalent to intimation in the presentment for acceptance of a bill drawn by a creditor on his debtor, which, when duly proved, operates both assignation and intimation in favour of the payee, even if the bill is not accepted. And the fact that actual notice, competently proved, is enough to complete the assignee's title, is strongly brought out by a case,¹ where it was found that the production and reading of the assignation of a share in a newspaper, at a meeting of the proprietors of the paper, when the assignee attended and voted in virtue of his assignation, being duly proved, was equivalent to intimation of the assignation to the other proprietors.

SASINE.

We have a further class of equivalents to intimation, in cases where sasine follows on the deed containing the assignation, and where the sasine is recorded; the registration being held sufficient to give notice to all concerned. A party who was one of two trustees in a testamentary trust of lands, and who likewise had a *jus crediti* as beneficiary under the trust, conceived that he was absolute feudal proprietor of the trust lands. In that character he granted a heritable bond over the lands, with all right, title, and interest which he had in them, on which the creditor was infeft. It turned out that the granter of the heritable bond had no title except in virtue of his *jus crediti* as beneficiary under the trust; but the heritable bond was held to contain an assignation of that right. This assignation required no intimation to the granter, because he was himself one of the trustees, and the registered sasine was considered equivalent to intimation to his co-trustee; so the creditor, under the heritable bond, was preferred to the trustee of the granter of the bond in a sequestration.² A decision, on the same principle, was subsequently pronounced in the House of Lords.³

FORMAL
INTIMATION
UNNECESSARY.

There are certain circumstances in which any form of intimation is unnecessary. These are—(1.) Where the assignee is himself the debtor or party to whom, if the assignation had been granted in favour of a third party, intimation thereof would have had to be given. There are no *termini habiles* for formal intimation by a man to himself; and, the object of intimation in an ordinary case being to make those interested treat the subject assigned as the property of the assignee, it is plain that, when the assignee himself is the debtor, delivery of the assignation necessarily operates all the intimation of which the case is susceptible. Upon delivery, he is in the same situation as a third party is, when exhibition is made to him of the assignation with a view to acknowledgment by him as debtor. And exhibition and acknowledgment being admitted as enough to instruct intimation when third parties are concerned, it is unavoidable to allow equal effect to delivery when the receiver is himself the debtor. Had the intervention of a notary and witnesses been necessary

¹ Hill, 12th Nov. 1847, 10 D. 78.² Paul, 22d May 1835, 13 Sh. 818.³ Edmond, 16th Nov. 1855, 18 D. 47; affirmed 26th Feb. 1858, 3 Macq. App. 116.

as a solemnity in connexion with title (as in the case of sasine of lands), the case would have been different. But, as regards intimations, the notarial proceedings are a mere mode of proof. Decisions, on the principle above stated, were pronounced in reference to the completion of assignments of tacks of teinds granted to the proprietors of the lands from which the teinds were leviable.¹ The teinds of lands are that portion of the produce, or of the rent, which belongs to the Church, or those in her right. Tacks of teinds were, until lately, in use to be granted by those in right of the Church. The tacksmen levied from the proprietors; and, when a tacksmen assigned to a proprietor the right of levying from himself, delivery of the assignment was found to complete the assignee's title. A judgment, on the same principle, was pronounced in another case,² where two partners carried on a marble and slate work as a private trading company. The marble and slate work was held by them as a company, as tenants, from one of the individual partners as landlord, under a lease which formed the principal part of the company property; and the landlord took an assignment from his copartner of his interest in the lease, in security of trade advances made by the landlord to his copartner. The business of the concern was carried on by an overseer; but the landlord, to whom the assignment was granted, was the only person to whom intimation would, on strict principles, in ordinary circumstances, have been given. Possession of the subjects of the lease continued to be enjoyed by the company long after the date of the assignment, just as before. At length the granter of the assignment became bankrupt. In the meantime, but within sixty days of the bankruptcy, intimation of the assignment had been made to the company's overseer. In these circumstances, the Court here, at first, held³ that, in respect the granter of the assignment was allowed to continue in possession of the subject conveyed, and no intimation of the assignment was made till within sixty days of bankruptcy, the assignment was not completed to the effect of giving a preference to the assignee in a question with the creditors of the cedent. This interlocutor was carried by appeal to the House of Lords,⁴ who remitted the cause to the Court of Session with directions especially to consider how, and to whom, intimation ought to have been given in this case, in order to secure the right of the assignee. The Second Division of the Court having, in accordance with the instructions of the House of Lords, taken the opinion of the other Judges, it was held that the assignment in this case did not require formal intimation to complete it. This judgment was affirmed.⁵ Cases of this last description, however, will always be regarded with suspicion. The Lord Justice-Clerk Boyle, in delivering his opinion in Russell's case, said, 'I have the greatest repugnance to

FORMAL
INTIMATION
UNNECESSARY.

¹ Montgomery, 27th July 1673, M. 841; Earl of Argyle, 14th Dec. 1676, M. 842.

² Russell, 3d July 1827, 5 Sh. 827.

³ 3d Dec. 1822, 2 Sh. 62.

⁴ 28th June 1825, 1 Wil. & Sh. App. 620.

⁵ 4th April 1831, 5 Wil. & Sh. App. 256.

'the transference of the share of a partner kept concealed from the world, the partner being allowed to go on with the management.'

COMPANY STOCK.

I may here notice, in order to prevent misunderstanding, the import of this decision as affecting the mode of transferring leases of heritable subjects. The subject assigned was the lease of a marble and slate work, and the general rule of law then was, that the assignation of a lease could not be made effectual without possession following. The rule is the same now, except as to leases entitled to the benefit of the Registration of Leases Act of 1857.¹ In Russell's case, possession did not follow in favour of the assignee, and yet the assignation was sustained. The reason is, that the assignation of the lease was in that case an assignation of part of the stock-in-trade of the company. As a lease, it could not have been validly assigned by a mere deed of transference. But, viewed as part of the company's stock, its character was changed, and it became transferable, just as the other stock-in-trade of a company is. Accordingly, in pronouncing judgment, the Court stated that the question as to the mode of transferring a lease did not arise; only that of completing the transfer, by one of the two partners of a company to the only other partner, of his share of the company property. Although, however, there can be no formal intimation in such a case as Russell's, it would seem expedient, in order to obviate the allegation of fraud, to enter the assignation in the books of the company, and do away with the latent character of the transaction as far as possible.

HEIR OF
ENTAIL.

2. We have another case in which there can be no formal intimation, viz., when an heir of entail acquires a debt affecting the entailed estate. His title is completed by delivery of the deed of transfer, there being no one, besides himself, to whom intimation of the transfer can be given.

MARRIAGE.

3. When the debt is due to an unmarried lady, formal intimation of the assignation arising to her husband by law upon her marriage does not require to be given to the debtor; the marriage being a public act, which is held to operate intimation. If, however, the debtor shall *in bonâ fide* pay to the wife, in ignorance of the marriage, he will not be liable in second payment to the husband. Moreover, though the marriage is equivalent to intimation, the husband takes, subject to all the burdens attaching to the right in his wife's person. The assignee of the wife, under an assignation granted before her marriage, but not intimated till after, is preferable to the trustee for the husband's creditors.²

TRUSTEE IN
SEQUESTRATION.

4. The trustee on a sequestrated estate has a complete right by force of the Bankrupt Act. The act and warrant of confirmation in his favour *ipso jure* vests in him, for behoof of the creditors absolutely, *inter alia*, the moveable estate of the bankrupt, to the same effect as if intimation had been made at the date of the sequestration.³ Effect was given to a similar provision in a former Bankrupt Act, in a case⁴ where

¹ 20 & 21 Vict. c. 26.

² Till, 27th July 1763, M. 2858.

³ 19 & 20 Vict. c. 79, s. 102.

⁴ Adam, 17th Jan. 1845, 7 D. 276.

the bankrupt had a sum of money lying in bank in his name at the date of the sequestration. The trustee acquired right to that sum by the act of confirmation in his favour, but never got it transferred to his own name in the bank books. The money remained in the name of the bankrupt, who got his discharge without composition, and therefore was not reinstated in any of his property. He again became bankrupt, when creditors arrested the money in bank, as if belonging to him. In the meantime, the trustee in the first sequestration had granted to third parties a general assignation of the bankrupt's funds, which included the money in bank, but which had not been intimated to the bank. In these circumstances, a competition arose between the assignees under the general assignation, as in right of the trustee in the first sequestration, and the arresting creditors of the bankrupt. The assignees of the trustee were preferred, on the ground that the first sequestration had divested the bankrupt, and given the full right to the trustee, even though the sum of money in question had never been entered in the trustee's name. His assignees were, of course, in as good a position as he.

The right of the assignee under an English commission of bankruptcy appears equally good and complete in virtue of the English Bankrupt Act.¹ So also is the right of the assignee under an Irish commission.²

CHAPTER III.

I NOW request your attention to certain other subjects which, in addition to debts due by bonds, accounts, etc., can be transferred by simple assignation. The most usual, and one of the most important of these, is the policy of life assurance, being an instrument by a life assurance company, whereby,—in consideration of a present payment, with or without a sum or premium to be paid to them yearly, or at stated intervals thereafter, during the life of an individual named, or for a specified number of years during such life, and on the understanding that certain specified particulars, connected with the probabilities of that individual's life, have been correctly stated, and that certain relative conditions shall thereafter be observed,—the company become bound to pay to the assured, or to his executors or assignees (according as the assurance is on the life of a third party, or of the assured himself), within a limited time after the death of the individual on whose life the assurance is effected, a specified sum, with or without profits (or bonus additions, as they are technically termed), as may be arranged.

ASSIGNATION OF
LIFE POLICY.

¹ 12 & 13 Vict. c. 106, s. 141.

² 20 & 21 Vict. c. 60, s. 267.

LIFE POLICY.

The above are the usual terms of the instrument when granted by a proprietary company, that is, by a company consisting of a number of persons who make up a capital stock towards meeting the engagements of the company. In another class of cases, the instrument, or policy, simply certifies and declares the assured, or his executors or assignees, to be entitled to receive, out of the funds of the association on whose behalf it is granted, a specified sum, with or without bonus additions, as in the other case. Policies of this last-mentioned class are granted by what are called Mutual Offices. In such cases there is no company, and no capital stock, and consequently there are no proprietors. The funds, out of which the assured sum and bonus additions are to be paid, arise from the contributions made by the holders of policies. In a Conveyancing point of view, the two instruments are much the same. Of course, in assigning the one or the other, care must be taken to describe the obligation or certificate accurately, according to its peculiar terms. The

* Act of 1862¹ is expressly applicable to policies of assurance by any assurance company or association in Scotland; and the forms thereby introduced will, in general, be found very suitable to the assignation of such policies, and ought therefore to be employed. Where, from any special cause, these forms will not suit, the assignation ought to make use of words of direct transfer,—that is, ‘I hereby assign, convey, and make over.’ The policy may be narrated, but in general any recital of it will only tend to lengthen the deed unnecessarily. The policy will be described, in the assignation under the Act (unless such assignation be written upon the policy), and likewise in the assignation under the old form, by specifying its date, the name of the association or company, the parties who sign it,—in most cases two or three directors and the manager or some other office-bearer;—the class, and number in the class, and then the engagement or declaration in favour of the assured. But the conditions annexed to the assurance should not be recited in the assignation. It is enough to refer to them as set forth in the policy. When the assignation is written upon the policy, it will simply say, ‘the within policy,’ or words to the same effect.

The assignation, if by a Scotch party, and of a Scotch company’s policy, will be executed in the Scotch form. Where the policy is by an English office, in which case the forms authorized by the Act of 1862 are not available, or at least have no statutory effect, I apprehend that the assignation may be validly executed by a Scotchman in the Scotch form. But having regard to the decision in a recent case,² in reference to a bond in the English form granted by Scotchmen to an English assurance company, the safe and expedient course in such cases appears to be to employ both the English and Scotch forms in authenticating the assignation.

The right to an assurance policy requires an assignation for its

¹ 25 & 26 Vict. c. 85.

² Church of England Fire and Life As-

urance Company, 12th February 1857,
19 D. 414.

* *Church of England Fire and Life Assurance Co. v. The Insurance Co. of Scotland*

transference, and is not passed by mere delivery of the *corpus* of the policy. The right constituted by the policy is a 'chose in action;' and, as to a Scotch policy, intimation of the assignation is necessary to complete the assignee's right.¹ In Strachan's case, an arrestment of the contents of a policy granted by a Scotch office in favour of a Scotchman, used during the life of the assured, who, however, died before any future premium became payable, was found preferable to an assignation in favour of an English assignee, not intimated, though accompanied by delivery of the policy. The intimation can be given, in the case of a policy by a Scotch office, in either of the modes authorized by the Act of 1862; or in the older form, if the Act of 1862 is unsuitable. The forms of that Act are not available, or at least have no statutory effect, where the policy is by an English office.

All the Scotch offices receive notices of assignations, enter them on their books, and give certificates of having done so; some of the English offices refuse to make any similar entry, or to take notice of the intimation of an assignation. In these cases, sometimes a formal paper, somewhat after the style of our schedule of notarial intimation, is served on the company at their head office in England, agreeably to English forms. Sometimes the parties give notice, notariaily of course, at the head office. The result I believe to be the same, whichever of these modes is adopted. What is wanted is evidence of the intimation in probative form.

In connexion with assurance policies, it is necessary to keep in view that no assurance can be made by any one on the life of another, who has not himself an interest in such life,—by 14 Geo. III. cap. 48,—an Act passed to prevent gambling in assurances. By sect. 3, assurances are restrictable to the amount of the interest when effected in excess thereof. Professor Menzies² notices the case of an assurance on the life of William Pitt, effected by a creditor, who, having got payment of his debt from Mr. Pitt's executors, was found not entitled to levy from the assurance company.

In transacting with policies on the lives of third parties, the company should be asked to admit the interest of the assured in the life of the party on whose life the assurance is effected, and in all cases to admit the age of that party. On proof shown, the Scotch companies will make markings to the above effect on the policy. If possible, the company should be got to declare the policy indisputable, which some of the Scotch companies will do in ordinary circumstances if the policies are of five years' standing or upwards.

The stock of banks and public companies is generally declared in the acts or charters of incorporation, or deeds of constitution, to be transferable only in a particular form, which the bank or company can

¹ United Kingdom Life Assurance Company, 7th July 1838, 16 Sh. 1277; Strachan, 19th June 1838, 13 Sh. 954.

² Menzies, p. 265.

BANK STOCK,
ETC.

BANK STOCK,
ETC.

require to be observed, in the case of absolute and voluntary transfers *inter vivos*. In these cases, words of direct transfer are usually, I believe invariably, employed. The Act of 1862 is clearly not intended to apply to assignations and transfers of which the form is regulated as in these cases. But the peculiarities of form prescribed by such acts, charters, or deeds are intended only for the benefit or convenience of the bank or company, which can dispense with them or not as they think fit. These peculiarities are not pleadable by third parties as grounds of objection to transfers in which the peculiarities have not been observed, but which have been accepted by the bank or company.¹ The non-completion of the transfer, in accordance with these forms, affords no ground on which the seller can resile from a sale which he has actually agreed on.² And an arresster of company stock is not entitled to plead non-compliance with statutory forms against the sufficiency of a previous assignation in security duly intimated.³

The contract of copartnery of a joint-stock company very often gives the company a right of pre-emption upon the sale of a partner's shares; and, when it does so, the provision to that effect must be fairly implemented; and, if the contract requires a written offer to be made, a verbal communing is not enough to supply its place.⁴ But it is for the company to plead this, as well as their own forms, or not, as they think fit.⁵ And if the company have, in the first place, clearly dispensed with these forms, they cannot afterwards go back on their own act, and say that the transfer is invalid for want of them.⁶

LEGACIES AND
REVERSIONARY
INTERESTS.

The next subject I notice is that of legacies and reversionary interests in trust estates, not yet payable or available. The Act of 1862 clearly embraces such rights and interests, and its forms will in general be found very suitable to their transmission. Previously, conveyances had been granted more frequently by the form of constituting procurators, than by words of direct transfer. Whatever form be employed, the legacy, or the interest, or share of interest, will be described in the assignation with reference to the testator, and the deed of bequest, or other deed, under which the right or interest assigned arises. The assignation ought likewise to show at what term, or under what circumstances, the legacy will become payable, or the reversionary interest will be available; and, in general, it will be convenient that the assignation shall specify who are the trustees and executors, or others liable to pay the legacy when due, or to make over the reversionary fund when the proper time comes. The deed, when so drawn, will fully explain its subject-matter, and will show to whom the intimation of the assignation ought to be made, that is, the trustees and executors, or

¹ East Lothian Bank, 3d June 1824, 3 Sh. 95.

² Weatherly, 3d June 1824, 3 Sh. 92.

³ Thomson, 23d Dec. 1842, 5 D. 379.

⁴ Craig, 2d Feb. 1848, 10 D. 576.

⁵ Turnbull, 1st March 1833, 11 Sh. 487.

⁶ Drummond, 22d May 1834, 12 Sh. 620.

others holding the fund, or liable to pay or make over the subject assigned. When the subject assigned is the reversionary interest under a trust, the assignation may be generally of 'all right, interest, claim, and benefit, now belonging or competent, or that shall belong or be competent to me, under and in virtue of a trust-disposition and settlement, dated and registered' (as the case may be), 'granted,' and so forth; and in the clause of assignation so much of the deed may be recited as is necessary to show that, after fulfilling the other purposes, the trustees are bound to make over the residue to the cedent, and his heirs or assignees. But, in cases of this last description, it will often be found convenient and advisable to recite the trust, or other deed of settlement, in the narrative of the assignation, and to make the clause of assignation refer to the deed of settlement as previously narrated.

With reference to the assignation of legacies or reversionary interests, I have to notice that important questions may arise as to the vesting of the legacy or estate; that is, whether the right of the legatee or beneficiary is contingent and possibly defeasible, or absolute, though not yet payable or capable of being realized. In either case, the legacy or reversionary right can be validly and effectually assigned; but, if the right has not become vested, the assignation will be subject to the contingency affecting the cedent's right. This point, therefore, will require the Conveyancer's special consideration. I shall have occasion to explain the general principles applicable to the vesting of legacies and reversions when treating of testamentary deeds. Where the legacy or estate has not become vested in the cedent, the defect in his right may be supplied by means of an assurance on his life, with security for payment of the premium, or by guarantees. But, in every case of assignation of legacy, and whether vesting has taken place or not, it is further necessary to inquire specially as to the particulars and value of the estate, to make sure that there is at least enough available to pay the legacy when due. When the reversionary interest is made over, such valuation will be the basis of the transaction. It must be kept in view, also, that, as regards the administration of the estate, the reversionary is in a great measure, and the legatee still more, in the hands of the trustees or executors, who have generally extensive powers as to the manner of laying out or investing the trust-funds. Unless, therefore, the trustees or executors are worthy of confidence, the assignee runs the risk of the legacy or reversionary right being dissipated. And, even if those acting at the time are trustworthy, there is still the contingency that their successors, if they themselves all die before the close of the trust, may not be equally so; and it must not be forgotten that testamentary trustees and executors find no caution.

As regards legacies, an expected bequest from a person still living cannot be validly assigned before the death of the testator; an assignation of such a subject granted before the testator's death, though intimated to the person named executor in the will, is inept in competition

with an arrestment used in the hands of the executor, after the testator's death.¹ A will confers no right until the testator's death. An assignation in such a case as the above is an absolute nullity.

REVERSION OF
TRUST ESTATE.

And, in connexion with the reversions of trust estates, it is important to keep in view the essential distinction between the right existing in the beneficiary, when, on the one hand, the trust is made by himself for payment of his debts; and when, on the other hand, the trust is made by a third party, with directions, after fulfilling prior purposes, to convey the residue to him. In the former case, where the trust is made by the beneficiary himself, the trust only creates a burden on the right of the truster, in whom the radical right to the estate remains. Notwithstanding that he has granted the conveyance to trustees, and that they may be infeft, or their title registered, and that the truster is for the time, and may, by their selling, be permanently dispossessed of the estate, the truster is still the heritable proprietor in virtue of the title which stood in his person before the execution of the trust. The trust-deed, in such case, is very much like a heritable bond with power of sale, and other extensive powers. In a case where a trust-right was so created, an adjudication of the estate was led by a creditor of the truster after the truster's death, on the footing of his having been heritable proprietor, and undivested. An adjudication was led by another creditor of the truster, on the footing of the truster having been divested of the estate, and having only a *jus crediti*, or personal claim against the trustee for reconveyance of the residue after fulfilment of the proper purposes of the trust. In a competition between the two adjudging creditors, the Court preferred the creditor who had adjudged the estate on the footing of the truster having been heritable proprietor and undivested.²

The converse of this case is that of Macdowall.³ Here, there was a general trust-disposition and settlement by a father, under which his eldest son was residuary legatee. On the father's death, the trustees completed titles to the lands in their persons for the purposes of the trust. Subsequently, the son granted an assignation of his right as residuary legatee under the trust, which the assignee duly intimated to the trustees. The son then became bankrupt, and, his trustee having adjudged the lands on the footing of the son being heritable proprietor, a competition arose between the son's assignee and the trustee on his sequestrated estate. The Court preferred the assignee. A decision, on the same principle, was pronounced in the case of Gordon's Trustees;⁴ and there can be no doubt that, in the case of the *jus crediti*, assignation is the proper form in which to acquire the right; whereas, in the other, assignation will not stand in competition with adjudication or heritable bond.

¹ Bedwells, 2d Dec. 1819, F. C.

² Campbell, referred to in Lord Moncreiff's Note in case of M'Millan, 4th March 1831, 9 Sh. 551,—a most instructive note.

³ Macdowall, 6th February 1824, 2 Sh. 682.

⁴ Gordon's Trustees, 4th Dec. 1821, 1 Sh. 185.

Patents for inventions, that is, letters-patent, now passing under the PATENTS. Great Seal of the United Kingdom, giving to any one in possession of an invention an exclusive privilege or interest therein for a term of years, usually fourteen, are personal estate,¹ and are transferable by assignment in ordinary form. But, in order to secure the assignee's preferable right, the deed of transference in his favour requires to be entered in the book called 'The Register of Proprietors,' kept in the Chancery in England, in terms of the Act 15 & 16 Vict. cap. 83, sect. 35, by which section it is declared that, until the entry is made, the grantee of the patent shall be deemed and taken to be the sole and exclusive proprietor. Entry in that book is therefore indispensable for completion of the right. And though the Act says nothing as to assignments in security, or mortgages of letters-patent, it is competent and certainly expedient to enter these in the Register as well as absolute transfers. Until the passing of the above Act, patents were obtained separately for England, Scotland, and Ireland; now one patent serves for the three kingdoms, but the Act allows of separate assignations, applicable to the whole or one or more of the kingdoms, at the party's discretion.

The Copyright, or exclusive right of publishing original literary works, COPYRIGHT music, and various other compositions, is also personal estate, and may be the subject of assignation. The copyright endures for forty-two years from the date of first publication, or for the author's lifetime and seven years more, if these together shall be longer than such forty-two years. The copyright is the property of the proprietor of the author's manuscript.² The Act 5 & 6 Vict. cap. 45, sect. 11, appoints a book of registry to be kept at the Hall of the Stationers' Company in London (Stationers' Hall) for registration of the proprietorship in the copyright of books and assignments thereof; and copies of entries from that book are declared to constitute *prima facie* evidence of such proprietorship or assignment. But if, in the course of a jury-trial, that evidence be rebutted, the party may support his title, without production of a formal instrument of assignation, attested by two witnesses.³

I have now to notice certain rights or subjects which cannot competently be assigned.

SUBJECTS
WHICH CANNOT
BE ASSIGNED.

Rights and obligations which, as being of the nature of *pacta illicita*, cannot be validly constituted by deeds, cannot form the subject of assignation. The right of gratuitous assignation, ordinarily competent to the creditor in a bond, may in certain cases be excluded by a simple clause of exclusion. A personal bond, apparently a bond of provision, though the report does not say so, in favour of two sisters and their heirs and executors, excluding their assignees, was found not to be assignable gra-

¹ Advocate-General, 20th May 1848, 10 D. 969.

² 5 & 6 Vict. c. 45, s. 3.

³ Kyle, 30th May 1856, 18 D. 906;

affirmed, 27th June 1859, 21 D. 8. (House of Lords Reports.) The report of the decision in the Court of Session exhibits the form of the certificate of registration, constituting a *prima facie* title.

tuitously by the one sister in prejudice of the other, and was held to fall to the surviving sister, as next of kin of the predeceaser, in preference to the gratuitous assignee of the predeceaser.¹ The deed of assignation here contained clause of absolute warrandice; but, whatever claim that clause might authorize against the granter or her representatives, it could not operate (directly at least) so as to enlarge the granter's power of disposal of the subject assigned.

The share of stock in a private trading company belonging to one of the partners cannot be assigned to the effect of making another person a partner, there being in the case of such companies a *delectus personarum*, which excludes the substitution of one partner for another, unless with consent of all the copartners, or a reserved power of substitution expressly provided in the contract.

ALIMENTARY
RIGHTS.

Alimentary rights, including salaries annexed to offices, so far as necessary for the holder's support, and for enabling him duly and properly to fulfil the duties of the office, are not arrestable for debt; and on the same principle they cannot be assigned, as their assignation is inconsistent with the purpose for which expressly they are granted.² The same rule has been applied to the assignment of the annuity payable to the widow of a minister of the Church of Scotland under the Ministers' Widows' Fund Act.³ But where the assignation, although of an alimentary fund, conveyed only arrears of the fund, and was granted in payment of debts apparently alimentary, an exception was allowed.⁴ In preparing the assignation of such arrears with a view to the payment thereupon of alimentary debts due by the cedent, special care should be taken to show that the debts so to be paid were really contracted for the cedent's aliment. Proof on this point should not be left to be adduced afterwards. An alimentary fund, however, cannot be assigned by anticipation, or even for future alimentary debts, and the alimentary debts must be strictly those of the party in right of the fund.⁵ Offices of trust cannot be assigned, because they are essentially personal. Agricultural leases for the ordinary period of endurance, and when not granted to the tenant and his assignees, cannot be voluntarily assigned without the landlord's consent, as *delectus personarum* is an inherent element in such contracts as regards the tenant. They can, however, be adjudged by creditors, or taken up by the trustee in a sequestration, unless they contain a clause of exclusion sufficient to embrace the ordinary legal rights of such adjudger or trustee. It is, however, necessary for the adjudger or trustee to enter into possession under the lease in order to complete his title. Leases of urban tenements, and liferent or long leases of agricultural subjects, as to which assignees are not expressly excluded, may be assigned; the nature of the subject, or the term of endurance, in these cases being held as implying power to assign. Moreover, possession does

OFFICES OF
TRUST.
AGRICULTURAL
LEASES.

¹ Boswall, 7th Feb. 1759, M. 12,578.

² Erskine, iii. 6. 7.

³ 17 Geo. II. c. 11.

⁴ Waddell, 26th Nov. 1836, 15 Sh. 151.

⁵ Rennie, as decided in the House of Lords, 25th April 1845, 4 Bell's App. 221; reversing the judgment of the Court of Session, 8th Dec. 1840, 13 Jurist 73.

not require to follow where the lease is for thirty-one years or upwards, and where both the lease and the assignation are registered in the Register of Sasines, in terms of the Registration of Leases Act of 1857.¹

The class of assignations in security, or bonds and assignations in security, is large and important. In either case, the substance of the assignation is the same. It is granted in security of the sums contained in the bond, where it is annexed to a bond, or of the debt otherwise arising, where apart from the writ constituting such debt. The bond, where one is prefixed, will be in the ordinary terms of bonds. The subject-matter contained in such assignations is various, comprehending bonds, legacies, reversions, stocks in public companies, assurance policies, patents, copyrights, ministers' stipends, and every claim of the nature of a 'chose in action.' When policies of assurance form the subject of the security, it is necessary to make provision for their being kept in force; for which purpose the bond will contain, besides the obligation for repayment of the money lent or due, obligations for the regular payment of the stipulated yearly premium, as also of additional premiums if necessary for any cause, and various other obligations connected with the same object, the particulars of which you will find in the Juridical Styles.² After these obligations, the deed will contain an assignation of the policy of assurance, in security of the several obligations and stipulations, with all the debtor's right and interest therein. If the policy be by a Scotch office, the forms authorized by the Transmission of Moveable Property Act of 1862 can be employed for the assignation. It is generally desirable that the creditor shall have power to surrender or sell the policy; and the requisite clauses to that effect may be introduced immediately after the clause of assignation. The obligations in this deed relative to payment of the life assurance premium do not infer *ad valorem* stamp-duty, in addition to that payable in respect of the bond.

The Style Book contains forms of bonds and assignations of corporeal moveables, and of the rents of lands in security of money lent. But, as to corporeal moveables, no security can be validly constituted by mere assignation, even if followed by instrument of possession in the form given in the Style Book, or any other form. Actual possession by deposit or pledge is essential, in order to make a security over such subjects. I therefore pass over that deed. As regards current and future rents also, the security by mere assignation is imperfect. It would not stand in competition with an adjudication of the lands; and it is good only against the granter and those who represent him, or who have only personal rights derived from him. Neither would the assignation to such rents, though intimated, be good in competition with a purchaser, or heritable creditor with infeftment or equivalent registration.³ And, where the granter can give heritable security, there seems no good reason for taking a mere assignation to rents.

¹ 20 & 21 Vict. c. 26.

² Style Book, i. 643.

³ Erskine, iii. 4. 4.

The assignation (by way of security) of a liferent right to lands, which, though constituted by infeftment or equivalent registration, is transmissible by simple assignation, without infeftment or registration, is hardly an exception to what I have stated; the subject of that assignation being the right to the lands during the granter's lifetime, with the corresponding rents. The granter thereby puts the assignee in his own full right and place. He can give no other or better or stronger right; and it does not seem enough to take, even from a liferenter, a mere assignation of the rents without the right to the lands during the party's life. Taking the liferent right to the lands, the rents follow as matter of course, with right to renew leases on their expiry, as far as the liferenter had such right, or to enter to possession. But, taking only the rents, there might be a question as to the power to renew leases, even to the extent of the liferenter's right, or to enter to possession. The mere assignation to rents, therefore, is a form of security in no case eligible.

LEASES
REGISTERED
UNDER ACT
OF 1857.

Probative tacks or leases, registered under the Leases Act of 1857,¹ can be assigned in security, according to the forms in Schedule B, and Schedule C, No. 2, annexed to the Act; the right of the assignee being completed by registration in terms of the Act, sect. 1, which requires assignations to be registered in the register wherein the leases assigned have been registered. Other leases are sometimes assigned in security, but, as to all leases not registered under the above Act, it is settled law that no security can be constituted by mere assignation; and that actual possession on the part of the assignee, if there is no sub-tenant, or intimation when there is a sub-tenant, is indispensable to make the assignee's right good and effectual against third parties. Moreover, in all cases, the assignee, after entering into possession, becomes liable during the subsistence of the security, or during the subsistence of the lease if the assignation be absolute, to pay the rent and fulfil the other stipulations in favour of the landlord.² This must often render the security over a lease very unmarketable. Where, however, there is a sub-lease, and the principal lease is assignable, a security can be constituted without actual possession of the subjects contained in the lease, and without the aid of the above Act. This is done by assignation of the lease and intimation to the sub-tenant and landlord. In such cases, the lands are in possession of the sub-tenant, and what the principal tenant has to give or assign is the right to recover from him the amount of the sub-rent. Intimation of the transfer of that right, therefore, to all concerned, places the assignee in the full right of the cedent. The liferent right to lands, and the right to a lease, being heritable, and not moveable property, the forms of assignation authorized by the Act of 1862 are not available, or at least have no statutory effect in the transmission of such rights.

MINISTERS'
STIPEND.

Ministers' stipends can be assigned in security of debt, but in fram-

¹ 20 & 21 Vict. c. 26.

² Ramsay, 20th Jan. 1842, 4 D. 405.

ing the clause of assignation care should be taken to include the stipend payable not only under the existing decret of modification and locality, but also under any new or subsequent decret.

There are various points to be kept in view and provided for in connexion with all assignments in security: (1.) In every case (except that of the assignation under the Leases Act of 1857, for which there is a statutory form) the assignation in security will contain an obligation on the assignee to account to the cedent for his intromissions, and to pay over to the cedent any sum or balance that may be due to him, upon the accounting, after deducting the debt in security of which the assignation is granted, and the expenses of making the assignation effectual, such expenses to be charged as between agent and client. (2.) The deeds will likewise contain an obligation on the assignee, after receiving payment of the debt and the expenses, not only to discharge the debt, but also to retrocess the cedent in the subject assigned, so far as outstanding at the time. (3.) Likewise, a declaration that third parties shall be exonerated and secured by the assignee's receipts or other writs. But where the subject assigned consists of a legacy, or reversionary interest under a trust, and the amount or value thereof is visibly in excess of the sums secured, it would not in general be expedient for the trustees to allow full effect to such a power. They ought, if possible, to get the legatee or beneficiary to concur with the creditor in granting the discharge, for their respective interests; and, if a voluntary discharge cannot be obtained, I apprehend that the usual course in practice is to call all parties interested into Court in a multiplepounding, and obtain the Court's exoneration. (4.) And, for the assignee's own protection, there ought to be a declaration that, in accounting, he shall be liable for his own individual and personal intromissions only, and nowise for omissions, nor to do diligence otherwise than as he shall think fit. How far such clause will protect the assignee will be a question of circumstances. Notwithstanding a very distinct clause of non-liability for omissions, he may make himself liable, especially in a question with subsequent assignees or other creditors. He ought, therefore, to proceed with all due caution and certainty, not less than a prudent man would exercise in the management of his own affairs. (5.) The deeds will of course contain a clause as to delivery, or exhibition of writs, with clause of warrandice from fact and deed, the amount of the debt being the measure of the warrandice in these cases.

The right of the assignee requires intimation for its completion, and, when the rents of lands or ministers' stipends are assigned, intimation of the assignation to the tenants or heritors existing at the date of the intimation ought not to be relied on for completing the assignee's right to rents or stipend falling due by succeeding tenants or heritors. On a change of occupancy or of ownership, therefore, intimation of the assignation ought to be given to the new tenants or owners. This may be less necessary when the change arises by succession than when the

new tenant or owner has no connexion with the old; but, even in the case of change by succession, it will in general be prudent to give new intimation.

THE TRANSLATION.

The transfer of a debt, when granted not by the original creditor, but by one who has acquired right in virtue of an assignation from that creditor, is technically called a 'translation.' Its object is precisely similar to that of the assignation, viz., to place a new creditor in the full right of the debt; and the forms authorized by the Transmission of Moveable Property Act of 1862 are expressly available for translations equally with original assignations.

As we have already seen, assignations were anciently in the form of appointments of procurators, or mandatories, for the special purpose of uplifting the debt. The translation, however, appears always to have been in the form of a simple and direct transfer. The procurator of the original creditor has always been allowed to grant a transfer in that form,—in other words, to do more than in early times his own constituent could; and, the debt being a 'chose in action' as much in the one as the other case, it is difficult to account on principle for the difference which has existed in the form of the deed of conveyance.

The translation heretofore in use has been in the same form as the first alternative form of assignation, which I have already given, with this variation, of course, that, after describing the bond in which the sums assigned are contained, the translation has said, 'to which bond, and sums thereby due, I acquired right, by virtue of an assignation dated _____, granted by the said _____, in my favour;' and the clauses of assignation and delivery of writs have comprehended the deed of assignation as well as the bond. The warrandice has been the same as in the assignation.

After a debt has been the subject of an assignation and translation, future transfers are usually called conveyances or assignations; but the import and effect of all these writings are the same. It is therefore desirable that they should all pass under the same name, and probably the simple and direct form authorized by the Act of 1862 will now be adopted generally, and the term 'assignation' will be given to them all.

RETROCESSION.

It sometimes happens that a debt or subject, after being assigned or transferred, is reconveyed to the former holder. This occurs most frequently where debts or other subjects have been made over in security. The writ by which they are reconveyed is technically termed a 'retrocession,' or 'giving back.' Lord Stair says it was at one time called a 'reposition,' or 'replacing.' The Act of 1862 expressly applies to retrocessions; and where such a writ is granted, independently of any special relation between the parties, such, for example, as that of debtor and creditor, it may be similar in structure to the translation; but, where the bond, or other subject to be given back, has been held in security, and the retrocession arises in consequence of the payment of the debt, or fulfilment of the obligation secured, the retrocession ought to narrate

the deed constituting the security, and the payment of the debt or fulfilment of the obligation secured, whereby it has become necessary that the bond or other subject assigned should be reconveyed, and therefore the assignee will reconvey to the party, his heirs, etc., either in the terms authorized by the Act of 1862, or, agreeably to the older forms, the sum of money (or as the case may be); with the bond (or as the case may be); and whether the previous assignation has been absolute, or only in security, the granter of the retrocession, if the older form be adopted, will reponé, restore, and retrocess his author in and to his right and place of the premises, with warrandice from fact and deed only.

The translation and retrocession require intimation equally with the first assignation, and the forms of procedure in each case will be the same. There is an old case,¹ in which an assignation, unintimated, was found to be evacuated by a simple retrocession, likewise unintimated; but, even if the assignation has not been intimated, it is clearly expedient to intimate the retrocession.

¹ Craig, 20th Nov. 1674, M. 838.

TITLE III.

EXTINCTION OF OBLIGATIONS.

CHAPTER I

THE next step in this course is to explain how personal obligations are extinguished and discharged.

FULFILMENT.

1. It may be said, generally, that every obligation is extinguished upon its being fulfilled. In cases of fulfilment, what is wanted is evidence of the fact. Under this head may be classed discharges under the Bankrupt Act, on composition or otherwise, or extrajudicially on composition; for although in these cases, in general, the debt or obligation is only in part paid or fulfilled, the utmost payment or fulfilment is implied which the debtor's estate will afford.

COMPENSATION.

2. Debts may likewise be extinguished by compensation; that is, when the creditor, in right of a debt, becomes debtor to his debtor, or *vice versâ*. In such circumstances, the law holds either party entitled to plead that the debts mutually due by them have become extinguished by compensation; for no man ought to be liable in payment of a sum to another person, who is liable in payment of an equal sum to him. This mode of extinguishing an obligation is substantially the same as payment of the debt; but compensation requires to be pleaded. It does not take effect *ipso jure*.

CONFUSION.

3. Debts are extinguished likewise *confusione*, or by *concursus debiti et crediti*. When the debtor, by succession or otherwise, becomes creditor in the debt, or the creditor becomes debtor, and liable in payment of the debt, he cannot at the same time be both debtor and creditor to himself.

NOVATION.

4. Debts may be discharged by *novatio debiti*; as when the creditor accepts a new obligation in lieu of the old; a bond, for example, in lieu of a bill. Along with this, Erskine¹ classes extinction by delegation; that is, when a new debtor is substituted for the old. These, however, are cases of the extinction of the original obligation, or original debtor's obligation, rather than of the debt itself.

¹ Erskine, iii. 4. 22.

5. Debts may be extinguished by simple consent; as when the creditor voluntarily makes a present of the debt, or when, as frequently happens in relation to provisions to wives and children, a new provision is accepted in satisfaction and instead of an old one. CONSENT.

6. Debts are extinguished by prescription, in consequence of the creditor failing to make any demand upon the debtor during the full space of forty years after the debt has become due and exigible. This authorizes the presumption of payment or fulfilment. Under this head may be noticed the discharge arising by taciturnity; always, of course, a case of circumstances. These circumstances must be such as to found the plea of presumed payment, satisfaction, or abandonment; but it is not necessary that the full prescriptive period shall have elapsed, in order to let in this plea. PRESCRIPTION.

7. We have already seen that the liability of cautioners, in certain cases, is limited by special Act of Parliament, so as to cease at the end of seven years from the date of their obligation; and there are various acts or omissions on the part of the creditor in cautionary obligations, calculated to affect the cautioner's position, or his right of recourse against the principal debtor, or against co-cautioners, which, if done independently of the cautioner himself, will, *ipso facto* or by special Statute, operate his liberation and discharge. LIBERATION OF CAUTIONERS.

It is proper, in every case where an obligation is extinguished, to obtain a probative written discharge. The discharge speaks for itself, and precludes questions which might arise and give trouble after those acquainted with the fact are dead or out of the way. The voucher of debt should also be delivered up, if it has not been registered. The maxim of the Roman Law was, '*Chirographum apud debitorem repertum presumitur solutum*;' and Mr. Ross mentions in his Lectures that the method of the Church notaries was to cut or cancel the deed after payment of the debt; indeed that some notaries inserted in bonds written by them a promise by the debtor, '*Non probare solutionem aut liberationem hujusmodi debiti, nisi per præsentis literas incisas vel cancellatas.*' But nothing is so conclusive as a distinct written discharge—*Litteræ scriptæ manent.*

Where the debt to be discharged is constituted by a bond not recorded, the simplest and best form in which to take the discharge is to have it written on the back of the bond; in which case it will consist of the following clauses, viz. :—(1.) The narrative—'I, A., within 'designed' (or, as the case may be), 'grant me to have instantly' (or, as the case may be) 'received from the within designed B. the sum of £ , 'contained in the within bond, with £ , being the interest due there- 'on, from the term of last, to the date hereof (all prior interest due 'to me having been formerly paid and discharged), amounting together, 'the said sums now paid to me, to £ . ' Then will follow (2) the clause of discharge, in these words: 'And therefore I hereby exoner, 'acquit, and discharge the said B., and his heirs, executors, and suc-

‘cessors, of the said sum of £ ’ (that is, the principal sum), ‘with the whole interest due to me thereon, and of the penalty stipulated by the said bond in case of failure; as also of the said bond itself, and whole clauses and obligations therein contained, and all that has followed or is competent to follow thereon.’ Next in order is (3.) the warrandice,—‘And I bind myself, and my heirs and successors, to warrant this discharge at all hands.’ Then (4.) the clause of delivery of writs,—‘And having herewith delivered up the within bond.’ And (5. and 6.) the registration and testing-clauses in ordinary form; the registration clause (if the short statutory form allowed by the Titles Act of 1860 be not adopted), specifying no number of days of charge, as it contemplates an ordinary action and claim upon the warrandice, and not summary diligence.

**DISCHARGE BY
ASSIGNEE.**

If the granter of the discharge is an assignee, and not the original creditor under the bond, he will add immediately before the clause of discharge, ‘to which bond, and sums thereby due, I acquired right, conform to’ (here he will specify the assignation or other writ or writs constituting his title). In that case, the clause of delivery of writs will embrace the deed or deeds of transfer, as well as the bond itself. A doubt has been suggested whether a discharge, written as above proposed, requires a receipt-stamp, but it is clearly advisable to affix the stamp. Where the principal bond has been recorded, the discharge will be written on a separate paper, in which case the only difference in form will be that, in place of the references to ‘the within bond,’ the description of the parties will be given by their designations, and of the bond by its date and date of registration. The discharge in this case will run as follows:—‘I, A., grant me to have instantly received from B. the sum of £ , being the principal sum contained in and due by his bond to me, dated , and registered’ as the case may be; or ‘being the principal sum contained in his bond to C., dated , and registered’ , etc., ‘to which bond, and sums thereby due, I acquired right, conform to’ (here he will specify the assignation or other writ or writs constituting his title). The discharge will then acknowledge the receipt of the interest, as in the case of the discharge indorsed on the bond; thereafter it will proceed,—‘And therefore I hereby exoner, acquit, and discharge,’ precisely as in the case of the discharge indorsed on the bond, avoiding, of course, the description of the bond as ‘the within bond.’

When the discharge is of consent, without payment, the only difference in its terms will be that, in place of narrating payment, it will bear to be granted for favour and regard, or some consideration of that nature, and the warrandice will be from fact and deed, not absolute. In such case, parties may be apt to rest satisfied with mere delivery or cancellation of the bond. There should, however, be obtained (if possible, for parties making gifts cannot always be asked to execute relative deeds) a written discharge; as the want thereof, when there could be no proof of payment, might place the donee in a position of embarrassment and difficulty.

The foregoing are cases of ordinary voluntary discharge upon full payment or of consent.

The judicial discharge in a sequestration is obtained in manner set forth in the Bankrupt Act of 1856.¹ It may be obtained either by payment of a composition upon the debts (sect. 137, *et seq.*),—in which case the bankrupt is reinstated in his property, so far as outstanding; and his creditors accept, in full of their claims on him, the obligation of himself, along with approved cautioners, for payment of the composition, the claim to which is specially reserved from the discharge;—or it may be obtained without composition (sect. 146, *et seq.*), in which case the bankrupt's property remains with the trustee in the sequestration, to be realized by him, and divided amongst the creditors, according to their rights and preferences. Here the discharge is without reservation.

A judicial discharge on composition is not evacuated although the composition, when it falls due, be not paid. The creditors, in case of a second sequestration, are not entitled to be ranked for the full original debt, on the footing of their discharge being only conditional on payment of the composition, and the condition unfulfilled. Their discharge is absolute, and in the second sequestration they can be ranked only for so much of the composition agreed to be accepted in the first sequestration as remains unpaid.² From various cases connected with such discharges, it is plain that the Court would not sanction any proposal to make the discharge of the debtor in a sequestration conditional on the composition being duly paid. But such a discharge, though it clears all debts due prior to the sequestration, does not extinguish the liability arising *ex jure nature* to pay annually the accruing aliment of a natural child born previously to that event. Any arrears due prior to the sequestration are included in the discharge. But the future aliment of each successive year thereafter is just a new debt, emerging year by year subsequently to the sequestration, and therefore due and exigible in full notwithstanding the discharge.³

In an extrajudicial arrangement, the creditors may make their discharge conditional on payment of the composition, or on other contingencies. If, however, they make no conditions, and, on receipt of composition bills, grant their debtor an absolute discharge, such discharge will receive effect; and, though their debtor shall afterwards be sequestrated, they will not be entitled to be ranked on his estate for more than the unpaid balance of the composition stipulated under the extrajudicial arrangement.⁴

Questions frequently arise in regard to the import of a general discharge, particularly when annexed to a special discharge; and great care is requisite in the preparation and adjustment of such deeds. Erskine

¹ 19 & 20 Vict. c. 79.

² Saunders, 10th March 1827, 5 Sh. 79.

565.

³ Marjoribanks, 30th Nov. 1831, 10 Sh.

⁴ Graham, 9th Dec. 1828, 7 Sh. 152.

JUDICIAL
DISCHARGE.

SPECIAL AND
GENERAL
DISCHARGE.

SPECIAL AND
GENERAL
DISCHARGE.

says,¹ in reference to such cases, that in deeds which contain both general and particular clauses, which last he describes as 'ascertaining their extent,' the general clause is not to be extended to subjects or claims of a different kind, or of greater importance than any of the particulars mentioned in the special clause. Thus in a discharge, a general clause annexed to a special will not include a heritable bond bearing a clause of infetment. On the same principle, a receipt in general terms, for all the claims of a party as outgoing tenant, annexed to a detailed account of items, was held to be a discharge of these items only, where it did not contain express terms giving it a wider application.²

But when a debtor owes to one and the same creditor several debts, which, though consisting of different sums, are of the same nature, the special discharge of one or more of these debts, followed by a general clause applicable to all debts due by the debtor to the creditor, may be extended to all debts so due which are of the same nature with those in the special clause; when, for instance, the debts are all personal and for sums of money.³ In Talbot's case, the general discharge was held to cover a debt eight times greater in amount than the sum contained in the special discharge, both debts being of the same description. A similar decision had been previously pronounced in the case of Lawson.⁴

An important decision was pronounced by the House of Lords as to the construction of a general clause annexed to a special, in the case of Ewen.⁵ In that case, a discharge was granted to a father by his daughter and her husband, on payment of a sum in full of all goods, debts, sums of money, and other moveables, claimable by and through the decease of her mother, by virtue of her mother's marriage-contract, or of any clause therein, 'which is hereby discharged, to all intents and purposes, as fully and effectually as if the same was particularly engrossed, or by any other manner of way, or by the decease of her father, either as bairns' part of gear, dead's part, portion-natural, or any other cause or account whatever, goodwill only excepted.' These words were held to import a discharge of all rights competent to the daughter under the contract of marriage, although these rights were very valuable, and the sum paid as the immediate consideration of the discharge was altogether insignificant in comparison. The discharge in this case was set aside in a subsequent action of reduction on the ground of fraud, as we formerly had occasion to see; but the principles laid down by the House of Lords, in regard to the legal import of the discharge, are deserving of careful study. The case is one of the leading authorities on the subject of general annexed to special discharges, and shows very plainly how necessary it is that parties should be fully informed of all the circumstances in which discharges with general clauses are asked of them.

¹ Erskine, iii. 4. 9.

² Marquis of Tweeddale, 26th May 1848, 10 D. 1053.

³ Talbot, 29th June 1705, M. 5027.

⁴ Lawson, 24th Feb. 1636, M. 5023.

⁵ Ewen, 28th June 1825, 1 Wil. & Sh. 595; reversing the judgment of the Court of Session, 15th Jan. 1824, 2 Sh. 612.

But, when the discharge is granted in ignorance of the existence of the rights which it is said to give up, general words annexed to special will not be allowed their literal effect. In the case of the Greenock Banking Company,¹ a discharge was granted by a daughter in her antenuptial contract of marriage, with concurrence of her intended husband, to her father, whereby, in consideration of £2000 paid by her father, in name of tocher, and which, in an event that happened, was to return to her father, the daughter and her husband discharged all that she could ask from her father through his decease. This discharge was held not to apply to a provision of £3000, to which the daughter had right on her father's decease, under his marriage-contract, and of which she and her husband had not been informed when they granted their discharge.

A discharge, however, which is entirely general, and does not mention any special debt or claim, receives a more enlarged interpretation; especially if it is the result of a transaction between the grantee and his whole creditors, which has in view the universal discharge of the grantee's debts. In the case of Harris,² a discharge under a composition-contract, of all debts and sums of money due previously to 9th December 1811, in whatever way vouched or constituted, was held to include the value of goods sent to the insolvent in July 1811; although the Court were satisfied that the goods had been actually delivered to him, and that no composition on their value had been paid. And, where a universal discharge is contemplated, it is not enough to exclude therefrom a debt then actually due, that the term of payment was not then come. A debtor obtained a discharge from his creditors of all debts contracted by him previous to the 1st of June 1822, with right to the whole vouchers thereof. He had granted a bill to a creditor, dated 25th May 1822, payable nine months after date, upon which the creditor executed diligence several years thereafter, and the Court found that, on a fair construction of the discharge, it included this bill.³

The case of the British Linen Company⁴ is very similar, but even stronger; the discharge there reaching a debt due at its date, but not then payable, and bearing something of the nature of cautionry, or at least of contingency, in its character. A bill for £1500, dated 1st November 1843, and payable at Whitsunday 1845, was drawn upon two acceptors. The bill was deposited with the British Linen Company, in security of advances to the drawer; one of the two acceptors became insolvent whilst the bill was current, and offered a composition of twelve shillings per pound in full of the debts and obligations due by him on 8th January 1844. This was fully two months after the date of the bill, but more than fifteen months before it fell due. The advances, in security of which the bill was deposited, amounted at 8th January 1844 to £2000, being more than the sum in the bill. The offer

¹ Greenock Banking Co., 17th July 1844, 6 D. 1340.

² Harris, 2d March 1822, 1 Sh. 370.

³ Adam, 9th March 1831, 9 Sh. 570.

⁴ British Linen Co., 6th June 1849, 11 D. 1104.

GENERAL
DISCHARGE.

of composition was accepted, and the creditors, in June 1844, whilst the bill was still current, executed a discharge 'of all debts, claims, demands, and sums of money due to them by the said A. B., reserving only our respective claims against the said A. B. for payment of the composition bills, and no more, and our legal rights in the event of the said composition bills not being retired when due.' The British Linen Company concurred in this discharge, claiming and receiving the composition on several debts, but making no claim in respect of the £1500 bill. Thereafter, the drawer of the bill became bankrupt, and the British Linen Company claimed from the joint-acceptor before referred to, and in whose favour the discharge above quoted had been granted, the £1500, or at least the corresponding composition. But the Court held the general discharge to cover this bill-debt, and extinguish it, as far as said acceptor was concerned. They further held, that as the bank did not bring their claim for the bill-debt at the time when the joint-acceptor was making the general arrangement of his affairs, and adjusting his offer of composition, they were not entitled afterwards to claim from him either payment in full, or the composition. The following passage from a note by Lord Ivory, Ordinary, is very instructive as to the principles regulating this decision. Speaking of general arrangements between insolvent debtors and their creditors, his Lordship says,—'Transactions of this kind are not so much mere bipartite contracts, between the debtor and each of his individual creditors considered separately, as tripartite contracts, between, 1st, the common debtor; 2^d, the general body of his creditors in their relation towards him, as the party receiving from all an universal discharge; and 3^d, the same body of creditors as contracting *inter se*, and with reference to their mutual relations towards each other, for the purpose of securing a perfect fairness and equality of position, without favour or preference of any kind, whether as regards the common debtor or his estate. Of course, this state of matters is conclusive as to the absolute impossibility of allowing any one or more of the creditors to reserve a particular portion of their debts undischarged, while all the rest are discharging their claims absolutely and universally. For every such reservation would necessarily involve both inequality and preference.'

Even a discharge wholly general, however, is subject to modification in its operation, in special circumstances. Thus a general discharge is not to be extended to debts of an uncommon nature, which are presumed not to have fallen under the granter's notice; for example, to obligations of relief from cautionary engagements, not yet paid to the creditor.¹ In *M'Taggart's* case, the cautioner had received, *unico contextu* with his granting the general discharge, a disposition in security of whatever sums of money he might advance and pay in consequence of any cautionary obligations, letters of guarantee, or other such obligations

¹ Campbell, 23d Jan. 1678; Oliphant, March 1682; Wood, 12th Dec. 1695, all M. 5035; *M'Taggart*, 24th Nov. 1830,

4 Wil. & Sh. 361; reversing the judgment of the Court of Session, 28th Feb. 1823, 6 Sh. 641.

granted, or that might be granted. The Court of Session sustained the discharge, as covering even the claims to which the said disposition in security applied, but the House of Lords reversed. The discharge, however, ought to have expressly excepted these claims.

A general discharge will not cover even claims of an ordinary nature, if they are such as the granter cannot be presumed to have had in view when he executed the deed.¹ A general discharge by a wife, arising by acceptance of a bond of provision from her husband, of all she can ask or claim through her husband's death, does not extend to her mournings as a widow, which are part of the husband's funeral expenses, nor to her aliment to the next term after her husband's death.² Neither will a general discharge include obligations of warrandice not yet incurred, nor an obligation to perform a special fact. Hence a general discharge of all debts and claims was found not to comprehend an obligation to purchase an apprising.³ Nor does it comprehend debts due by the grantee, which the granter had assigned to another previously to the discharge, although the assignation had not been completed by intimation, unless it be proven that payment or satisfaction was truly made to the granter of the discharge for the sum assigned.⁴ In neither of the cases noted, however, was payment of the bond assigned alleged; and the cases are to be contrasted with a case⁵ where a general discharge, bearing receipt of complete payment of all bonds, tickets, accounts, nols' prices or others, preceding the date thereof, was held to include a bond for the price of fourteen oxen, although the bond had been previously assigned, the assignation not having been intimated. In this last case, the assignation was granted to the original creditor's son; but the decision appears to have turned on the evidence which the discharge gave of actual payment by the debtor; not on any ground of fraud and collusion between the father and son.

In general, when a party has discharged another of all claims, on payment of a sum of money, it is not competent to open up the transaction, on facts and circumstances of which he was then aware, or on vague allegations of fraud and concealment.⁶ But there are circumstances in which a discharge, though acknowledging payment of a sum of money, and granted in general and comprehensive terms, may be opened up, or passed over. In a case where the discharge proceeded on the narrative of a settlement by composition, and stated that composition bills were granted, the execution of the deed in these terms was found no bar to a claim for the composition, when it was admitted that the bills had not been granted, and the composition not paid.⁷ A party who had right to an annuity, clear of legacy-duty, granted receipts for a series of payments

¹ Moon's Trustees, 28th June 1836, 14 Sh. 1026.

² Rennie, 16th May 1800, M. App. Pre-sumption, No. 4.

³ Dalgarno, 19th November 1680, M. 5030.

⁴ Blair, 3d Feb. 1671, M. 940; Lady Logan, 14th Feb. 1736, M. 5041.

⁵ Alexander, 24th Nov. 1713, M. 5041.

⁶ Campbell, 30th May 1822, 1 Sh. 446.

⁷ Glass, 12th May 1825, 4 Sh. 1; Thomson, 1st Dec. 1829, 8 Sh. 156.

thereof, under deduction of the duty. It was held that he was still entitled to payment of the sums deducted.¹ And a much stronger case of exception to the general rule occurred² where a party had, upon a full and distinct narrative of a certain obligation in her favour, and after acknowledging the receipt of a specific payment, in full satisfaction of all sums due or claim competent by virtue of the obligation (in so far as prior to the date of the discharge), discharged her debtor of the specific sum, and of all sums due or claim competent accordingly; and of the deed containing the obligation, so far as relating to sums received prior to the date of the discharge, reserving claims for sums to be thereafter received. This discharge had proceeded upon a special statement of claim, which was made up under material error, inasmuch as it stated to the credit of the party the one-half only of a succession, where she had right to the whole. There was and could be no dispute as to the fact of an error having arisen. Neither had there been any dispute as to legal rights, nor any transaction or compromise as of a questionable claim. It was a case of simple error arising from ignorance of rights. And the case turned upon the effect of the words of the discharge. Had the sum in the special statement simply been paid, and no discharge taken, or had the discharge been simply of that sum, without the addition of the general words above quoted, the case would have been clear, the special sum only would have been discharged. But the deed in its terms discharged not only the special sum, but also all sums due and claim competent in virtue of the obligation, etc. The case was one of great difficulty, especially in consequence of the views stated in the House of Lords in the cases of *Wilson and Dixon*, both formerly referred to, as to the rule that repetition of money, overpaid in error, can only be allowed if the error was in fact. But here there was no overpayment sought back. The case was one of underpayment, and of discharge granted *sine causa*, and where the understanding and intention of the parties was clear. The Court therefore refused to carry the principle laid down by the House of Lords, as to overpayments made in error in point of law, so far as by mere parity of reason or analogy to give to the words of a discharge the same effect, both as to money paid, and as to money not paid. They accordingly reduced the discharge, so far as granted *sine causa*, and in ignorance of the parties' legal rights.

When a party has once admitted that an acknowledgment of full payment is contrary to the fact, and that he did not pay in full on receiving it, the *onus* lies on him to show that he afterwards paid the balance.³ But, where a written receipt has been granted, the allegation that the money nevertheless is still due can be proved only by the writ or oath of the party in whose favour the receipt has been granted.⁴ A

¹ *Beaton*, 8th Feb. 1853, 15 D. 373.

² *Dickson*, 17th Feb. 1854, 16 D. 586.

³ *Magistrates of Nairn*, 2d Feb. 1830,
8 Sh. 432.

⁴ *Gordon*, 11th June 1833, 11 Sh. 696.

See also, in reference to this point, *Swan*,
13th Dec. 1836, 15 Sh. 251.

similar decision as to the legal mode of proof was pronounced in reference to markings on a bill, by the creditor, of certain payments as made to account and in full thereof. These, it was found, he could not contradict by parole.¹

Discharges are sometimes granted subject to conditions or qualifications operating, it may be, to render them unavailing in certain circumstances. In these cases, the party desiring to take advantage of any condition must strictly observe the relative obligations incumbent on or affecting himself. A creditor granted a discharge, on composition, to a principal debtor, with this condition, that if a cautioner for payment of the debt discharged should agitate the question of law, whether he, the cautioner, was liberated by the creditor's discharge of the principal debtor on payment of the composition, such discharge should be void, and the composition should be then repaid. The cautioner did agitate the question judicially, but the creditor, having omitted to repay the composition to the principal debtor, was held not entitled to plead that the discharge was null as to that debtor, because he, the creditor, had not complied with the relative condition of repaying the composition.²

CONDITIONAL
DISCHARGE.

When a debt is to be paid, it is of course necessary to take care that the money is actually delivered to the right party, or to one duly authorized to receive and discharge it, and who possesses the character in which he professes to act. The receiver also must be of age, and competent to grant a valid and effectual discharge. We have already seen MINORS. that a minor who has no curators cannot require his debtor to pay, because he cannot give a discharge absolutely effectual.³ In such cases, the party, if not mentally incapacitated, ought to choose curators to act with him, and if he fails to do so, or if he is subject to mental incapacity, the proper course for the debtor is to make consignment of the principal sum in a chartered bank; the bank's voucher specifying from whom the money comes, and that it is the amount of the debt due to the minor, or incapacitated person. The money, in such cases, will be uplifted and paid as soon as a valid discharge can be granted. But the interest on debts due to minors, if required for their maintenance, can in general be safely paid on their own receipt.

We have seen that a discharge in name of parties as tutors to a pupil, granted after expiration of their office, is not valid.⁴ But a discharge, where the parties granting it, in the character of attorneys, were also executors of the will of the creditor, was held binding on the granters as executors, although their office of attorney had fallen by their constituent's death (of which they were in ignorance), before the execution of the deed.⁵ The payment was there made to the right party, which necessarily operates discharge, assuming that the party is fully competent to act for himself.

¹ Macfarlane, 15th Feb. 1828, 6 Sh. 556.

² Osborne, 18th May 1832, 10 Sh. 546.

³ Hay, 22d Feb. 1749, M. 8973; Kirkman, 1st Aug. 1782, M. 8977.

⁴ Lockhart, 15th December 1826, 5 Sh. 136.

⁵ Mackenzie's Trustees, 19th June 1829, 7 Sh. 774.

PAYMENT *bona fide*.

There are even cases in which payment, if made by the debtor *in bona fide* to one who, he had probable ground to think, had right to the debt, —though in fact he had not,—will effectually extinguish the obligation.¹ We have had to notice a case of that nature, viz, where the debtor paid to a married woman, after the debt was by her marriage legally transferred to her husband. A recent case, very special in its circumstances, was decided in favour of the debtor partly on the same principle.² But, in order to have access to the plea, there must be good grounds for the belief. A debtor, who paid up to one of two heirs-portioners the whole of a heritable debt, notwithstanding the reported existence of the other heir in America, was ordained to pay the one-half a second time to the other heir on his appearing about ten years afterwards. But there was at least undue haste in concluding against the existence of the absent heir, and likewise strong suspicion of collusion.³ Again, where a bond to which a wife succeeded, without making up a title in her person, fell to her husband *jure mariti*, as not being due at the time of her succession, and the debtor, after the husband's death, paid the interest to the wife (then widow) for nearly forty years, he was held not discharged, and was found liable to pay a second time to the husband's executors. The plea of *bona fides* was held excluded, because the widow had no title.⁴

TO EXECUTOR-DATIVE.

Generally, debtors ought to take the benefit of all the precautions against false claims which the law allows, and to require of those who claim from them as creditors the observance of all the forms requisite for their protection and security. In the case of Buchanan,⁵ a bank having paid £1000, lying in deposit in name of a deceased party, to the sister and executor-dative of that party, who had completed titles only to £20 of the debt, was found liable in second payment of £980 (the difference between £1000 and £20) to parties claiming under the will of the depositor. The fact of the appointment of an executor-dative—that is, an executor given by the Court—generally implies that there is no executor-nominate—that is, an executor named by the deceased. The executor-dative in this case was the next of kin of the deceased, and legally entitled to the money if there had been no will. There was, likewise, in the case no allegation of fraud or collusion between the debtor and the party who received the money. But the bank could not have been compelled to pay more than the £20 on the title offered them; and the Court held them liable in second payment, being of opinion, apparently, that if debtors paid without requiring all the securities which the law gave them in regard to title, and likewise in regard to caution, which an executor-dative is bound to find, they waived these securities at their own risk. Lord Murray says,—‘Where a debtor does not avail himself of a right given him, for the protection both of himself and the true

¹ Erskine, iii. 4. 3.

² Stewart, 8th July 1859, 21 D. 1180.

³ Howes, 2d Dec. 1758, M. 1799.

⁴ Gray, 11th March 1859, 21 D. 709.

⁵ Buchanan, 30th November 1842, 5 D. 211.

'creditor' (that is, the right to require a title and caution), 'his plea of *bona fides* amounts to no more than his ignorance of a fact of which he had no suspicion, and which might be very improbable, but against the possible occurrence of which the law enabled him to guard himself.'

Payment ought not to be made to the creditor's factor as on behalf of the creditor, although the factor is in possession of the document of debt, and ready to deliver it up along with his own discharge to the debtor on payment, and although the factor has been in use to draw the interest. The document is with the factor for custody, not for realization; the receipt of interest is an act of administration, nowise implying that he has power over the principal; and the delivery of the document of debt, by one not authorized to give it up, operates no extinction of such debt or document. Payment made, in these circumstances, to a factor, who delivered up the document of debt (a promissory-note), was found no defence against a claim subsequently made by the creditor himself. The debtor had to pay a second time.¹

The question, whether the simple delivery to a bank of a deposit-receipt granted by them is a sufficient discharge of the debt constituted or represented by the receipt, was raised in Stewart's case, but did not require to be discussed. Lord Deas expressed an opinion against the sufficiency of the discharge by mere delivery.

Cases sometimes occur in which a deficiency of title to discharge, on the part of the creditor, is supplied by an arrangement for the re-investment of the money after it is paid up. Thus a sum lent on bond to a wife in liferent for her liferent use alienably, excluding her husband's *jus mariti*, and to her lawful issue in fee, was called up, and a discharge was offered by the wife, and by her husband for his interest, and as administrator for their children. The debtor consigned the money in bank; and, an offer being made by the husband and wife to re-invest in the same terms as formerly, the Court found that the discharge as above, accompanied by the re-investment, was sufficient for the exoneration of the debtor.² Of course the debtor, in that case, would require to see that the re-investment was duly made. That, however, is an objectionable footing on which to place a debtor; and the case will serve to enforce what was said before as to the convenience of having trustees interposed, when money is to be lent for behoof of one in liferent and another in fee.

In a case somewhat similar, a capital sum had been appointed by a father, in his daughter's marriage-contract, to be invested by his heirs for his daughter and her husband in liferent, and their children in fee; failing children, the capital sum was to revert to the spouses. But the marriage-contract contained no appointment of trustees, and did not otherwise provide for the administration of the fund. The Court, on the application of the husband, and after a tutor *ad litem* to the children had concurred, appointed a judicial factor under the marriage-contract,

¹ Duncan, 24th Jan. 1851, 13 D. 518. ² Scott Moncrieff, 25th Feb. 1846, 8 D. 548.

with power to uplift and discharge the provision.¹ The Court held the marriage-contract as substantially, though not in express words, creating a trust.

DISCHARGE OF
DEBTOR IN
SEVERAL
CHARACTERS.

Special care is necessary in framing a discharge, where the debtor is bound or liable in several characters,—for example, as a partner of two several companies, each of which is bound for the debt. In such cases, if the discharge is granted otherwise than upon full payment, the discharge of the party in one character—say the discharge of one of the companies, and of the partners as individual members of that company, does not relieve him from liability, in his separate character, as partner of the other company. Such liability remains undischarged.² On this subject reference may be made to the case of *Melliss*,³ where the discharge granted to a company under the Bankrupt Act, 54 Geo. III. cap. 137, was found not to comprehend a discharge to the partners of the company as individuals. But in that case the creditor claiming from a partner, on the ground that he was not discharged as an individual, stood in circumstances somewhat peculiar, and the Court were not unanimous.

PRESUMPTION
OF PAYMENT BY
PROPER DEBTOR.

When a debt is paid, the presumption is that the payment is made by the proper debtor. If the payment is not so made, the discharge or receipt ought expressly to state by whom the payment is made. Effect was given to the legal presumption on that point in the cases noted.⁴ And if the creditor holds heritable or other security for payment of the debt, and the person paying is not the proper debtor, such person should obtain not only a receipt specifying that the payment is made by him, but also an obligation to assign the debt and security to him; and, if he makes any entry in account-books of the payment of the debt, he ought to make the same on the footing of the payment being an advance by way of loan to the proper debtor. The agents for the creditor in a heritable bond paid the interest on it out of their own funds, for several years, on behalf of the debtor, who was also their client, and granted receipts for the interest—stating (*inter alia*) that of said interest ‘all concerned are hereby discharged;’ and made relative entries in their books. The Court held that by their procedure they not only ‘received the money, as acting for the heritable creditor, but paid it as acting for the debtor.’⁵ The Court accordingly found that the interest was discharged and extinguished; and that the agents could not afterwards obtain an assignation of the bond and security for the interest, from the creditor in the security, so as to acquire a preference for the amount of the interest paid by them over ordinary creditors of the debtor.⁶ The agents, when paying out the interest from their own funds, ought to have taken the receipts for such interest to themselves, with right to require an

¹ *Melville*, 8th March 1856, 18 D. 788.

² *Sharpe*, 11th July 1829, 7 Sh. 901; *Lindsay*, 20th Jan. 1844, 6 D. 412.

³ *Melliss*, 22d June 1815, F. C.

⁴ *Halyburton and Nisbet*, both decided on 26th July 1711, M. 11,528.

⁵ *Lord Fullerton*, 11 D. 260.

⁶ *Tod*, 13th Dec. 1838, 1 D. 231.

assignment of the security, postponed of course to the cedent's security for the principal sum and future interests; and they ought not to have entered the payment of the interest to the debtor's account with them. They should have stated it in their books in a separate account as a loan from them to the debtor.

In the following case, under different circumstances, a different result was arrived at. Payment of the interest of a debt, secured by heritable bond, was made for a series of years by the creditor's agent out of his own private funds, for the accommodation of the debtor. But the creditor's agent was not the agent of the debtor; and he retained in his own hands, undelivered, all the receipts which were granted for the interest. These receipts purported that the payment had been made by the debtor, and they contained an express discharge to 'all concerned.' Notwithstanding these unqualified terms, the receipts never having been delivered to the debtor, or to the debtor's agent, were held not to discharge the debtor, who had, in fact, paid nothing. The agent making the advance was accordingly found entitled to a postponed assignment of the security created by the heritable bond, so as to give him a preference over ordinary creditors of the common debtor, to the extent of the interest so paid.¹

CHAPTER II.

UNDER the head of extinction *confusione* there are a few cases of EXTINCTION
confusione. considerable practical interest which may be shortly noticed. Thus, where the holder of a heritable bond over an estate buys the estate, and the amount of his bond is allowed him out of the price at settlement, he becomes the proper debtor in the bond, which is thus extinguished *confusione*. Though the estate shall be afterwards conveyed by a *mortis causa* deed to a stranger, the heir-at-law cannot claim the heritable bond as a separate subject.² In cases of that description, however, it is usual and proper to execute and record discharges of debts, so as to clear the record of the apparent burden.

The operation of the plea of *confusio*, and likewise the mode of excluding the plea, in certain cases, will appear by contrasting one or two decisions in which debts were held extinguished, with others in which they were not.

I notice, first, cases of debts extinguished.

1. In the case of Forbes and Company,³ a debt due by an entailor, to the individual who happened to be heir under his entail, was held to

¹ Wood, 20th Dec. 1848, 11 D. 254.

² Hogg, 11th Dec. 1832, 11 Sh. 198.

³ Forbes & Company, 17th Nov. 1802, M. App. Taillie, No. 10.

CONFUSIO.

be extinguished on the creditor's succession to the debtor's unentailed as well as entailed lands; and not capable of being kept up as a debt against a succeeding heir of entail. The creditor, by his succession to the debtor's unentailed estate, became the proper debtor in the entailor's debts, and the obligation to pay, and the right to receive, concurring in one and the same person, the one extinguished the other.

2. In the case of *Codrington*,¹ a party succeeded to an estate as heir-male, and obtained himself served, not only heir-male, but also heir-of-line, to his predecessor; and intromitted with the rents. Thereafter, he took steps with a view to limit his liability as heir-of-line, by making up inventory, in virtue of the provisions of the Act 1695, cap. 24. He then paid the debts of his predecessor, taking assignations thereof to himself, his heirs and assignees. But it was held that, by his service as heir-of-line, and intromissions, without having previously taken the steps required by the above Act, he had made himself the proper debtor; and that his predecessor's debts, though assigned to him and his heirs and assignees, had become his debts, and were extinguished by his having paid them.

3. In the case of the Duke of Roxburghe,² an heir of entail in possession redeemed a wadset,—that is, paid a heritable debt, secured by a deed somewhat resembling in its effect the modern bond and disposition in security, over parts of the entailed lands,—by taking an unconditional discharge. It was held that the wadset was thereby irrevocably extinguished.

In *Forbes and Company's* case, the debt could not by any means have been kept up, after the succession of the creditor to his debtor's unentailed estate, assuming always that such estate was adequate to the payment of all the debts affecting it. Supposing it not to have been so, the heir might, upon application to the Court or by other judicial measures, have got the extent of the inadequacy proved, and himself, or some one else, found to be a creditor to that extent, upon the entailed estate and succeeding heirs of entail. In *Codrington's* case, however, it was an obvious error to expedite a service as heir-of-line, and intromit with rents, before having done what was necessary for limiting the heir's liability, in terms of the Act of 1695. If these steps had been duly taken in the first place, the heir might thereafter have proved the deficiency of estate, and have kept up the debt to the extent of such deficiency, even if he had paid it. But the Duke of Roxburghe, if he intended to keep up the wadset, ought to have taken a conveyance thereof, reciting payment of the debt by him out of his own money, and disposing the wadset to himself, and his heirs or assignees whomsoever.

You can contrast these cases with the following, in which the debts were not extinguished:—

¹ *Codrington*, 31st March 1824, 2 Sh. App. 118.

² *Duke of Roxburghe*, 9th March 1825, 1 Wil. & Sh. 41.

1. In the case of Crawford,¹ an heir of entail in possession paid up a bond of provision affecting the entailed estate, granted by a former heir to his younger children, and took an assignation to himself, his heirs, and executors. It was held that the bond was not extinguished *confusione*, and that the heir so paying was entitled to transmit the bond to his general representatives as a debt against the succeeding heirs of entail and the entailed estate.

2. In the cases of Lawrie² and Welsh,³ likewise, heirs of entail in possession, who had paid up entailer's debts upon assignation thereof in favour of themselves and their heirs and executors, were found entitled to re-issue the debts to third parties as debts against the succeeding heirs and entailed estate.

Confusio requires that the two rights—that is, the full right to receive, and the full obligation to pay—shall concur, as in Forbes and Company's and Codrington's cases. But heirs of entail in possession are not personally subject to the full obligation to pay the debts contracted by the entailer, or otherwise affecting the entailed estate. The heirs of entail in possession are the proper debtors only to the extent of the interest becoming due and payable on the debts during their possession of the estate. The entailed estate, and the heirs of entail, as a body or class, are the debtors in the principal sum. But, as any creditor may make a present of the debt to his debtor, so an heir of entail, as in the Duke of Roxburghe's case, can, if he thinks fit, discharge the debt absolutely, and thereby give the entailed estate the benefit of his payment.

Under the head of *Novatio*, also, there are some cases deserving attention, as of great practical importance. I cite, first, cases in which the plea of *Novatio* was not sustained.

A bond by a principal and cautioners, which had not been delivered up by the creditor, was found not innovated by a bill granted to the creditor by the principal debtor and a new cautioner.⁴ A bill, accepted by A. for the accommodation of the drawer, B., and indorsed to C., was found not innovated by an acceptance from B. (the real debtor) to C., the indorsee. The original bill had not been delivered up. Baron Hume, in his notice of this case, says,—‘It is always much against the plea of *novatio*, that the creditor retains the original document of debt, for which, if he meant to abandon it, he could have no occasion.’⁵ A law-agent does not innovate his account so as to lose his hypothec, by taking a bill, bond, or promissory-note for the amount.⁶

A heritable bond of relief, granted in security of relief of the sums contained in two bills specifically narrated, is not vacated in consequence of these individual bills having been retired by subsequent renewals ;

¹ Crawford, 11th March 1809, F. C.

² Lawrie, 7th December 1830, 9 Sh. 147.

³ Welsh, 11th February 1837, 15 Sh. 537.

⁴ Journeymen Dyers, 11th Feb. 1802, Hume, 244.

⁵ Crow, 15th Dec. 1803, Hume 247.

⁶ Linning, 27th June 1821, 1 Sh. 87; Skinner, 31st May 1823, 2 Sh. 354.

the new bills being obviously renewals, and the debt remaining undischarged.¹ But, when a heritable security is to be framed for payment or relief of the sum in a bill, care should be taken to make the bond perfectly independent of the particular bill. The bond should be for the relief of the debt, and should declare that no innovation shall be inferred from taking new bills. Moreover, as already suggested with reference to bonds of relief in general, there should be an obligation to pay, not merely to the proper creditor, but also, in the cautioner's option, to the cautioner himself. It would be well also to preserve the old bills undischarged, marking on them that they are not to be made use of in addition to the new bills.

On the other hand, and in contrast with these cases, it was decided² that a bond by an heir of entail for the sum in a bill by the entailor,—which bill was delivered up,—innovated the bill. The claim on the entailed estate was thereby lost, the liability being transferred to the heir of entail personally. And³ a creditor, holding a bill from two obligants, took a heritable bond from one of them, and delivered up the bill. The granter of the heritable bond became bankrupt within sixty days, and the bond was abandoned as struck at by the Act 1696, cap. 5; but the creditor was found not entitled to recur to the bill, and enforce it against the other obligant. This case illustrates the caution formerly given, when considering the operation of the above Act, as to the substitution of new in place of old securities. The creditor should have retained the bill, at least till the bond became unimpeachable.

DELEGATION.

Delegation, as already observed, consists of the substitution of one debtor for another, the creditor remaining the same. Instances in which one debtor is substituted for another are not uncommon,—when lands, burdened with heritable debts, are sold, and the purchaser takes the place of the seller as to these debts. But arrangements of that nature require regular and formal deeds, expressly binding the purchaser, and releasing the seller. These, therefore, are not proper discharges by delegation.

A proper case of such discharge arises where an assignable lease is fully transferred to a new tenant; the old tenant is thereby discharged of all liability, except for the rents which fell due prior to the transfer of the lease. As regards the subsequent rents, not only is the new tenant liable, but he is the only party liable.⁴ On the same principle, when a tenant died, and his heir became the acknowledged tenant in his room, the landlord was not only not a creditor of his deceased tenant's executors for the future rents, but was not entitled even to retain, for payment of such rents, funds in his own hands which belonged to the deceased.⁵ But, although the heirs of a landlord, who dies during the currency of a

¹ M'Nair, 16th Feb. 1827, 5 Sh. 372.

² Stevenson, 13th Nov. 1805, Hume 245.

³ Black, 15th Dec. 1814, F. C.

⁴ Skene, 20th May 1825, F. C.

⁵ Duke of Gordon, 8th March 1791, M. 5444.

lease, are the proper debtors in sums conditioned by the lease, to be paid to tenants at the end of their lease, for meliorations made during the lease, the landlord's executors are equally liable to the tenant; and the executors are not entitled to a declaratory judgment as against the tenant, that the personal or executry estate is not liable.¹

The extinction of debts by the negative prescription requires only a short notice. Such extinction is allowed on the principle that payment is presumed; and I may here notice the essential distinction between the legal plea of prescription, and the statutory plea applicable to cautionary obligations. As to these last, the Act of 1695 operates in the same way as if every deed to which it is applicable had contained an express clause to the effect that the obligation should cease at the expiry of seven years from its date; except so far as it should be kept up by diligence done within the seven years. This is not a case of presumption. It is an absolute statutory limitation, operating the extinction of the obligation, without regard to any question as to presumed payment. The prescription of forty years, which alone is applicable in the case of obligations by ordinary bonds or the like, operates absolute extinction on the presumption of payment. This plea, when it has arisen, as regards such obligations, cannot be elided by reference to the debtor's oath, as is competent in the case of the triennial prescription of accounts, etc. The full term of forty years, however, must run in order to admit the plea. In one case, action for payment of a bond was raised and executed on the last day of the thirty-ninth year from the term of payment. From various concurring circumstances, there was a strong presumption that the debt had been paid or extinguished; but the Court held that the presumptive evidence was not conclusive; that, in order to be so, it ought to be utterly irreconcilable with the idea that the bond was still due; and that, the bond being *ex facie* an unexceptionable written document, effect must be given to it.² In that case, the bond was found in the creditor's possession at the time of his death, which operated strongly against the presumption of payment.

I noticed taciturnity as, in special circumstances, a ground on which to plead extinction of a debt; and you need only now be referred to the case of Thomson,³ in which the plea was sustained, and the principles applicable to it are well illustrated. You will also find the nature of the plea commented on by the Lord Justice-Clerk Inglis, in a more recent case in which the plea was not sustained.⁴

¹ Walker and Others, 18th July 1857, 19 D. 1099.

² Graham, 18th Dec. 1823, 2 Sh. 594.

³ Thomson, 8th Dec. 1849, 12 D. 276.

⁴ Moncrieff, 11th January 1859, 21 D. 216.

CHAPTER III.

DISCHARGE OF
CAUTIONERS.

HITHERTO we have been considering, for the most part, the case of ordinary obligants, and the rules of law applicable to the discharge or extinction of their debt or claims. And now the case of cautioners, and the peculiarities in their position which give rise to a claim of liberation or discharge on their part, require particular attention. This subject is large and important, and the relative cases are very suggestive.

BY DISCHARGE
OF DEBTOR.

The cautioner, although liable for the whole debt, has undertaken only an accessory obligation, which implies that there shall be a principal debtor bound. And, accordingly, one who is simply cautioner is not bound unless the principal debtor, as well as he, shall sign the obligation;¹ nor if the debt guaranteed is allowed to prescribe.² And, generally, every defence and objection against payment, competent to the principal debtor, is open to the cautioner also. Moreover, the cautioner, having undertaken for another, is entitled by law and in equity (if called on to pay the debt) to recover from the principal debtor. He undertook to pay for, and at the request of, the principal, and has the *actio mandati* against him. He has also right to an assignation of the creditor's claim against the principal debtor, and of the grounds of debt,—the *jus cedendarum actionum*; and if (the case not being one of sequestration in bankruptcy) the creditor shall discharge the principal debtor, the cautioner is liberated, because the creditor cannot then assign his debt to the cautioner, so as to enable him to recover from the principal debtor.³ The cautioner's consent to the discharge of the principal debtor, however, will bar him, *personali exceptione*, from pleading that discharge as extinguishing his own obligation.⁴ And, in cases of sequestration, the cautioner is not freed from his liability in respect of any vote given or dividend drawn by the creditor, or of his assenting to the discharge of the principal, or to any composition.⁵ Nor is the cautioner liberated by the discharge of the principal debtor under a voluntary composition-contract, if such discharge be qualified so as to preserve the obligation on the principal debtor, provided the extinction thereof would have the effect of freeing the cautioner.⁶ The difficulty in Smith's case was not one of principle; it arose from the very imperfect manner in which the qualification was expressed. The creditor, however, may lose his claim on the cautioner, not merely by granting voluntarily, without consent of

¹ Crichton, Dec. 1612, M. 2074.² Halyburtons, 12th July 1735, M. 2073.³ Wallace, 13th Jan. 1825, 3 Sh. 433.⁴ Fleming, 24th May 1823, 2 Sh. 336.⁵ 19 & 20 Vict. c. 79, s. 56.⁶ Smith, 22d Nov. 1821, 1 Sh. 159; affirmed 7th June 1825, 1 Wil. & Sh. 315.

the cautioner, a discharge to the principal debtor, but generally, by acting without such consent, so as really to prejudice the cautioner, or his claim and right of recourse against the principal debtor. Thus, if the creditor refuses payment of the debt after it is due, and when payment is tendered unconditionally, he will not be entitled afterwards to claim from the cautioner;¹ or if the creditor enters into an illegal agreement with the principal to the prejudice of the cautioner.² Lawson's was a case of judicial cautionry for a curator, and the act done was described by the Lord Ordinary Fullerton as equivalent to an extrajudicial recal of the curatory. And, a cautioner having relief not only against the principal debtor for the whole debt, but also against co-cautioners for their proportions, liberation was held to follow when the creditor, during the currency of the obligation, and before it was at maturity, discharged one of several co-cautioners without consent of the others, and apparently without any payment.³

LIBERATION BY
DISCHARGE OF
CO-CAUTIONER

The rule, that the discharge of one of several cautioners, without consent of the others, shall operate the discharge of all, is now absolute, being incorporated in the Mercantile Law Amendment Act.⁴ But the enactment is expressly declared not to extend to the case of a cautioner consenting to the discharge of a co-cautioner who may have become bankrupt. And it has been found not to apply to cautionary obligations executed before the passing of the Act.⁵ It was also decided, that where three co-obligants were jointly and severally bound, *ex facie* as principals, though truly cautioners only, for a debt which was past due, the discharge by the creditor to one of the three who paid up one-third of the debt, not only of the sum which he paid, but also of all other claims at the instance of the creditor, reserving the creditor's claims for the two-thirds still unpaid against the other two obligants, did not operate the discharge of these two obligants. But in framing the discharge to one of several cautioners or co-obligants, care should always be taken expressly to preserve recourse against him for any share of further liability which may eventually arise by the insolvency of a co-cautioner; if it is the agreement of parties that he is to be liable for such share.

The cautioner's *jus cedendarum actionum* gives him right to an assignation, not only of the obligation for payment of the debt guaranteed, but also of all securities held by the principal creditor, and which can be conveyed without prejudice to the creditor. And if the creditor shall, through neglect, have rendered stipulated securities unavailable, the cautioner will be liberated.⁶

The cautioner, moreover, is freed if the creditor is chargeable with material misrepresentation or concealment; for example, as to the real

¹ Cooper, 27th June 1834, 12 Sh. 834.

² Lawson, 17th May 1837, 15 Sh. 930.

³ British Linen Co., 25th Jan. 1853, 15 D. 314.

⁴ 19 & 20 Vict. c. 25, s. 9.

⁵ Church of England Fire and Life Insurance Co., 17th July 1857, 19 D. 1079.

⁶ Fleming, 23d May 1826, 2 Wil. & Sh. 277; Storie, 3d June 1830, 8 Sh. 853.

nature or amount of the obligation undertaken by the cautioner;¹ or if he subscribes in reliance on the obligation of another, and is not made aware that such other has been already discharged;² or if the conditions of the principal obligation are varied without his knowledge. In the case of Taylor,³ the obligant agreed to be collaterally bound for £100, towards a composition of 10s. per £1, to be paid by another; but the composition having been fixed at 10s. 6d. per £1, without consulting him, and the arrangement otherwise varied, he was held to be liberated. Again, where the cautioner said: 'I make a point of it that mutual discharges for bygones shall take place at least once every year,' and no such annual settlement took place with the principal debtor, the cautioner was held to be free.⁴

LIBERATION OF
CAUTIONERS
FOR DISCHARGE
OF AN OFFICE.

BY NEW
ARRANGEMENTS
AND NEGLIGENCE.

Liberation arises in favour of the cautioners for the due discharge of an office where new arrangements are made with the principal (the party holding the office), which ought to be, and are not, notified to the cautioners, and where their consent to continue bound is not obtained. Such consent ought to be obtained expressly, and not left to implication. Where new arrangements were made with a bank-agent, increasing his responsibility, but without notice to his cautioners, the cautioners were found to be freed of their bond, although the agent's salary had been increased.⁵ And gross negligence on the part of the obligees or creditors, as intrusted with the oversight and superintendence of their agents, is enough to free the cautioners without any positively new arrangement. Thus, where bankers in Scotland allowed their agent to extend their business to England, contrary to the law of England, also to violate instructions, incur unusual hazard and loss, and become deeply involved, the cautioners, not being apprised, were held free.⁶ And where the accounts of a judicial factor were allowed to remain for several years unexamined, and were at last audited without notice to the cautioner, the cautioner was allowed to suspend, without caution, a charge for payment of the balance on the accounts; that is, he was allowed to try his objections to liability, without, as in an ordinary case, finding caution before being heard.⁷ Another point to be guarded against, on the part of the creditor of co-cautioners, is agreeing by positive contract to allow time to the principal debtor for fulfilling his obligations. A creditor making such agreement by positive contract, without the consent of the cautioner, or co-obligants, will liberate them.⁸ Lord Brougham, in Mackenzie's case, says, 'It is plain that a surety has an absolute right to be let off, if time 'is given to the principal by the obligee; that is, if time be given by

¹ Royal Bank of Scotland, 20th July 1844, 6 D. 1418.

² Wingate, 4th Dec. 1829, 8 Sh. 185.

³ Taylor, 20th June 1816, Hume 108.

⁴ Forbes, 10th June 1829, 7 Sh. 732.

⁵ Bonar, 17th July 1847, 9 D. 1537; affirmed 9th August 1850, 7 Bell's App. 379.

⁶ Leith Banking Co., 12th May 1830, 8 Sh. 721; affirmed 1st Oct. 1831, 5 Wil. & Sh. 703.

⁷ Pringle, 17th Nov. 1832, 11 Sh. 47.

⁸ Mackenzie, 23d Sept. 1831, 5 Wil. & Sh. 504; reversing the judgment of the Court of Session, 4th June 1830, 8 Sh. 862.

'virtue of positive contract between the creditor and principal debtor, not where the principal (that is, the creditor) is merely inactive.'

ALLOWANCE
OF TIME TO
DEBTOR.

Lord Cringletie, in the case of Hume afterwards cited, approves of the following statement of the rule relative to giving time: 'It does not consist in merely abstaining from taking legal steps for recovering payment, but in some positive act on the part of the creditor, whereby, without the concurrence of the sureties, he prolongs the term of credit to the principal debtor, so as to preclude any steps from being taken against the debtor till the prolonged period shall expire.' The rule, as thus stated, was applied in the cases noted.¹ And the non-application of the rule, where the allowance of time arises by merely abstaining from legal steps, and without contract, is shown by the case of Fleming.² The rule, as to not contracting to allow time, extends to the obligants in letters of guarantee, who have the privilege of suretyship; so that if the creditor grant delay to the debtor, by taking bills or otherwise, without consent of the granter of the letter of guarantee, such granter is free.³ And the rule is applicable where the cautioner is bound for the interest only, equally as when he is bound for principal and interest.⁴ But it may be doubted if the rule would be applied with equal strictness in reference to the relief competent to one class of heirs against another, where the obligation binds all as co-obligants, jointly and severally, without the benefit of discussion.⁵

Hitherto we have been considering the case as between the creditor and the cautioner. And it may be laid down, generally, that one of the several cautioners may lose his rateable recourse against his co-cautioners, in the same way as we have seen that the creditor may lose his entire recourse against the cautioners as a body. This doctrine received effect, in a case where one of several cautioners, by positive contract, gave time to the principal debtor, and relinquished securities.⁶ The security relinquished was a bill, in lieu of which there was obtained a bill for the like sum, and apparently by the same party. But the second bill proved to be a forgery. It was suggested, as probable, that the first was so too; but the cautioner had lost the means of proving that, by having given it up. We thus see, that, in order to keep up the claim on a cautioner, the creditor requires to exercise great care in transacting with the principal debtor, very much as an exact and prudent man would do in a case where he had only the principal bound, and no cautioner. Nothing should be done or assented to by the creditor, which can be legally construed so as directly or indirectly to prejudice the cautioner, without first obtaining his written consent in a probative form. And co-cautioners must observe the same care with reference to each

CO-CAUTIONER'S
RELIEF *inter se*.

¹ Mactaggart's representatives, 24th Jan. 1834, 12 Sh. 332, as reversed 16th April 1835, 1 Sh. & M'Lean, 553; Creighton, 6th Feb. 1838, 16 Sh. 447, affirmed 26th May 1840; 1 Robinson's App. 99; Morison, 16th Feb. 1849, 11 D. 653.

² Fleming, 24th May 1823, 2 Sh. 336.

³ Richardson, 29th March 1853, 15 D. 628.

⁴ Forsyth, 8th Feb. 1859, 21 D. 449.

⁵ See Stuart, 6th Feb. 1852, 14 D. 443.

⁶ Hume, 12th Jan. 1830, 8 Sh. 295.

other, as the creditor, with reference to the whole body of the cautioners.

DISCHARGE AND
ASSIGNATION.

I will conclude this subject with an explanation of the combined discharge and assignation. This deed is usually taken from a creditor, to whom the debt is paid by a party, liable in payment as in a question with him, but ultimately liable in part only, or not at all, as in a question with others,—for example, in the case of a cautioner paying a debt, whereof he is entitled to relief in whole from the principal debtor, or in part from one or more co-cautioners or co-obligants. Having already explained the principles on which such relief is obtainable, and the general rules to be observed on a cautioner making payment in order to place his rights of recourse on the best footing, I will proceed at once to the details of the deed. The clauses are :—

1. The introductory or narrative,—which, in this case, will recite the obligation by the principal and cautioner; the clause or bond of relief, if any; the transmissions of the debt, if any; the demand of payment made against the principal and cautioner, and legal steps following thereon, if any; the payment by the cautioner of the sum in the bond, with interest and expenses, specifying the amount of each; and that the creditor has been required to grant the discharge and assignation.

2. The discharge,—which will, as in an ordinary case, exoner, acquit, and discharge the cautioner, and his heirs, etc., of the debt, and bond and diligence, if any; care being taken to limit the discharge to him, and his heirs, etc., exclusively.

3. The assignation,—which usually bears expressly to be granted for enabling the cautioner to operate his relief against the principal, and, so far as competent, against other cautioners; and then proceeds in the usual form of an assignation, specially conveying the diligence done, if any.

4. The warrandice,—which is at all hands in so far as regards the discharge, and from facts and deeds only as regards the assignation.

5, 6, and 7. Clause of delivery of writs, and registration and testing-clauses, as usual.

This deed ought to be intimated to the principal debtor and co-cautioners.

The above is applicable to the case where the cautioner is expressly bound as such, or has a bond of relief, proving that he is cautioner only, and not co-principal. When the cautioner is bound, *ex facie*, as a principal debtor, and when he has no clause or bond of relief, it is expedient for him, as was formerly explained, on his making payment of the debt, not to take a discharge and assignation to himself, as in that case there would be nothing on the papers to show that he was not himself properly liable in payment of a share at least of the debt; and by taking the assignation to himself, extinction of the bond—not of the cautioner's claim of relief, but of the bond as a document of debt,—*pro*

WHERE CAU-
TIONER *ex facie*
A PRINCIPAL
DEBTOR.

tanto, would arise, *ex confusione*. Although, therefore, he would still have right, by an ordinary action, to sue the principal for the whole debt, he would have no right to raise summary diligence against him for the whole. The usual course, in such case, is to take an assignation of the debt in favour of a third party, *ex facie* absolutely, but really as trustee for the cautioner. The assignee, holding this title, can use the bond against the principal, as well as against the co-obligants; but, of course, he cannot charge the latter to pay more than their rateable shares. In this way the co-obligant preserves all his rights. The assignee should execute a probative declaration, expressing that the debt was really paid by the cautioner, and that the assignation is held in trust for his behoof; and binding himself to denude or assign, when required, and to account for all his receipts; he being liable to do no diligence, but only to act honourably, and the cautioner being bound to relieve and reimburse him of all expenses, loss, etc. But the trustee will be entitled to relief of expenses, without special obligation in his favour to that effect.¹ Care of course should be taken in the selection of the trust-assignee, because the trust, being latent, would not affect onerous *bond fide* special assignees, deriving right from him.

¹ Alison, 26th Feb. 1840, 2 D. 676, as in Digest, vol. ii. p. 1431, No. 124.

TITLE IV.

PERSONAL CONTRACTS, OTHER THAN THE CONTRACT OF MARRIAGE.

CHAPTER I.

WE are now to consider the forms of certain personal contracts, and I begin with the Indenture.

THE INDENTURE.

The term 'indenture' is derived from an old practice of cutting, or indenting, the several copies of mutual deeds in such a way that, when the copies were laid again together, they fitted into each other, or were found to be cut so as exactly to correspond with each other. In England, the term is still used as applicable to mutual or bilateral deeds, in contradistinction to the term 'deed-poll,' applied to deeds by one party, and which, though strictly speaking 'bilateral' in many cases, it was not the practice to indent, but to cut or poll even. With us, the term 'indenture' is now applied exclusively to the contract between a master who is to teach, and an apprentice who is to learn, a profession or trade. It does not appear that the term was ever much used in our practice for other deeds. Nor was it ever customary with us to cut or indent the paper on which the deed now called an indenture is written. I have been unable to discover for what reason we adopted the name of 'indenture' in this particular case, and not in regard to other contracts. Perhaps it is a deed borrowed from England, and with which, in its present form at least, we were not early familiar. There is no form of it in Dallas's Styles.

OBLIGATION OF APPRENTICE.

The indenture now under consideration is a very simple deed, containing, on the one hand, an obligation by the apprentice to serve his master in his profession or trade for a certain number of years, and during that term to be honest, diligent, and obedient; to reveal none of his master's secrets, and to conceal from his master nothing injurious to his master's interests which may come to his (the apprentice's) knowledge. He binds himself also in constant daily attendance, and not to be absent

without leave, generally under the penalty of extra attendance, in case of unauthorized absence.

A cautioner for the apprentice usually binds himself for the fulfilment of these obligations, and to make good to the master any loss or damage he may suffer through the apprentice's fault or fraud. The apprentice and his cautioner bind themselves jointly and severally, and the apprentice grants his cautioner an obligation of relief in usual form. CAUTIONER FOR APPRENTICE.

The master, on the other hand, in consideration of the obligations undertaken by the apprentice and his cautioner,—and of the fee, if such is paid to him by or for the apprentice,—binds himself, and his heirs, executors, and successors, to instruct the apprentice in his profession or trade, and to conceal no part thereof from the apprentice, as far as he is able to learn it. OBLIGATIONS OF MASTER.

Both parties bind themselves to perform their respective parts of the contract to each other, under a specified penalty in case of failure.

Where there are two or more partners in business, to whom an apprentice is to be bound, it is usual for him to engage himself to them, and the survivors or survivor of them; the masters, on the other hand, bind themselves and the survivors or survivor to teach the apprentice. And where a contract of service is entered into with a company, *socio nomine*, the party engaging to serve is bound even to a single remaining partner, after all the others have retired.¹

Indentures must be executed with all the solemnities appropriate to ordinary deeds. And, if any of the parties cannot write, it is necessary, in order to found a claim for more than £8, 6s. 8d. against such party under the deed, that two notaries, duly authorized by him, shall subscribe on his part, in presence of four witnesses.² But an informal indenture may be validated by homologation or *rei interventus*.³ AUTHENTICATION.

The general rules applicable to deeds by minors having curators operate in reference to indentures; and where a minor, whose father was alive, entered into an indenture without the consent or knowledge of his father, as his curator, the indenture was found null.⁴ But where the apprentice's brother represented himself as tutor, and signed as cautioner and consenter, and the real guardian was cognisant of the fact, though not a party to the deed, the deed was sustained.⁵ An apprentice, however, bound already to one master, cannot engage himself to another.⁶

The amount of the apprentice-fee, when there is any, regulates the stamp-duty payable in respect of the indenture; and the Stamp Act, 8 Anne, cap. 9, sect. 35, requires the full amount to be specified in words at length in the deed. By the same Act, sect. 39, all indentures in which the amount of the fee is not duly inserted, and which are not duly stamped, are declared null; and the nullity is declared removable only within a

¹ Campbell, 13th Feb. 1827, 5 Sh. 335.

² Ferguson, 30th June 1758, M. 16,848.

³ Rymer, 19th July 1781, M. 5726; and Neil and Tait, 31st Jan. 1807, Hume, 20.

⁴ Low, 14th November 1797, Hume, 422.

⁵ Harvie, 7th March 1829, 7 Sh. 561.

⁶ Macgregor, 31st May 1825, 4 Sh. 51.

short specified period.—Sects. 37 and 38. But, as explained when considering the stamp laws, the indentures of law-apprentices, though not written on the proper stamp, can be stamped at any time, on payment of the proper duty and the penalty. The Act of 1856, which allows such after-stamping in this case, does not go beyond the indentures of law-apprentices, neither does it, as to them, expressly abrogate the nullities introduced by the Act of Queen Anne, nor declare the indenture, when duly stamped, as good to all intents and purposes as if it had been stamped before it was written on. But probably the Act 37 Geo. III. cap. 136, sect. 2, would be held to reach this case.

The Act of Queen Anne further imposes the sanction of nullity in case of not specifying in the indenture the full sum received, or in anywise directly or indirectly given or secured, with or in relation to the apprentice. The original statutory nullity on that point thus remains as it was at first, and it has been rigidly enforced. For example, indentures have been held void or reduced, because small pecuniary compliments to the master's wife had been stipulated for, in addition to the fee specified in the indentures.¹ And where a bill was given for the amount of the fee, and not specified, the indenture was found null; and the bill, which had not passed into the hands of an onerous third party, not actionable.²

In construing the indenture, the Court will give fair implement to its provisions, but they will have regard to the nature and object of these provisions as affecting both parties, and will not hold the particular clauses of the deed as excluding liability for whatever is not therein expressed. The apprentice, for example, may be required to teach a younger apprentice in the trade he is himself learning, though there is no express obligation to do so in the indenture.³ But he cannot be compelled to work on Sunday, even though his indenture stipulates for his attendance 'on holiday and workday.' This cannot mean Sunday, as it would be illegal for any one to bind himself to do what Statute expressly prohibits under a penalty.⁴ Neither can he be made to do work different from that specified in his indenture.⁵ The master, again, is bound to teach the apprentice his profession or trade. But it will depend on the nature of the business to be taught whether he must himself give constant personal attendance for that purpose. In the case of a wright, it was held sufficient implement of the master's obligation, that, although he gave little personal attendance, yet the work in his shop was daily carried on by experienced journeymen, and the apprentice had thus the means of receiving constant instruction.⁶ The master cannot change the nature of his business during the currency of the indenture.⁷ In Chiesly's

DUTY OF
APPRENTICE;

OF MASTER.

¹ Horsburgh, 20th Jan. 1727, M. 585; Macleod, 10th Jan. 1738, M. 585.

² Donaldson, 14th Feb. 1754, M. 587.

³ Ballantyne and Co., 21st Nov. 1811, F. C.

⁴ Innes, 19th May 1835, 13 Sh. 778; re-

versed 20th Feb. 1837, 2 Sh. & M'L. App. 465.

⁵ Symontoun, 14th Jan. 1673, 2 Br. Sup. 166.

⁶ Gardner, 13th July, 1775, M. 593.

⁷ Chiesly, 5th Dec. 1665, M. 9150.

case, the apprentice was bound to his master as an apothecary,—in those days one who made drugs,—and the master gave up that employment and became a druggist,—one who bought drugs;—an essentially different trade, especially as regarded the apprentice; whereupon the master was not allowed to charge for payment of the apprentice-fee, but he was allowed to prove that he made drugs still; and, no doubt, if he established that point satisfactorily, he could not be held to have changed his trade. The master must, moreover, comply with every legal requirement necessary to enable him to exercise the trade he has undertaken to teach; particularly, he must take out the license, if any is enjoined by Statute, for qualifying him to carry on his trade.¹

In this contract there is a *delectus personæ*, so that neither party can substitute another in his place. As to the master, this holds even in the case of a Joint-Stock Company, the partners of which are liable to much fluctuation. Such a company cannot hand over their apprentice to another similar company.²

DELECTUS PERSONÆ IN THE CONTRACT.

The contract of indenture is merely personal, both as regards the master and the apprentice, and is dissolved by the death of either.³ But, although the apprentice dies, the master is not bound to repay any portion of the apprentice-fee previously paid, or to abstain from claiming any portion not paid.⁴ If, during the currency of the indenture, the master dies, or becomes bankrupt, or deserts his business, the apprentice appears to have a claim of return for a proportion of the fee previously paid,⁵—but not simply the portion corresponding to the unexpired time of the apprenticeship, because an apprentice becomes more useful as his instruction goes on, and it is assumed that the fee is required more with reference to the early, than the later years.⁶ In Cutler's case, it was also found that, as the master's representatives had offered to instruct the apprentice by a qualified assistant, and the apprentice had refused their offer, he had no claim for the return of any portion of the fee; but it seems doubtful if that view is consistent with the later decision in Neil's case, which was unanimous.

The cautioner's obligation and liability extend to loss sustained through the apprentice's fraud, as well as his fault.⁷ The master, however, may preclude himself from claiming damages by acquiescence, or non-interference, as where the apprentice leaves his service, and takes other employment under his eye, and is allowed to continue therein for a course of years.⁸ And, if an apprentice is taken away by a master to whom he was previously bound, the second master will have no claim if

CAUTIONER'S LIABILITY.

¹ Watson, 16th Nov. 1826, 5 Sh. 3.

² Edinburgh Glasshouse Co., 22d Dec. 1789, M. 597.

³ Neil, 15th July 1760, 5 Br. Sup. 877.

⁴ Shephard, 19th November 1760, M. 589.

⁵ Ogilvy, Feb. 1683, and Fairy, both

2 Br. Sup. 34.

⁶ Cutler, 17th Feb. 1711, M. 583.

⁷ Forbes, 2d July 1708, 4 Br. Sup. 708.

⁸ Robinson, 19th June 1800, Hume, 20; see also Ferguson, 15th June 1815, Hume, 21.

IMPRISONMENT
OF APPRENTICE.

he was duly certiorated of the first indenture before entering into the second.¹ Where there is no cautioner in the indenture, and the apprentice has no means, the master's remedy, in case of the apprentice's desertion, and refusal to return to service, is to apply to the Judge Ordinary, who will, on summary application, grant warrant for the apprentice's imprisonment, till he find caution to return to his work, and continue therein; sometimes for a short limited time, as a month, sometimes without the specification of any limit;² but it is illegal to imprison 'till the apprentice find caution to fulfil all his obligations under the indenture.'³

ENLISTMENT.

Apprentices are not entitled to set themselves free by entering into the Queen's service, and, if they enlist, their masters may reclaim them.⁴ This applies whether the apprentice has chosen to enter the army or navy,⁵ unless the apprentice has been bred to the sea before entering into indentures, in which case he cannot be reclaimed, if he shall enter the Royal Navy, on the ground that, as he might be impressed into the service, so he may enter it voluntarily.⁶ When a master reclaims an apprentice from the sea-service, he is not bound to find caution to restore him at the expiration of the indenture.⁷ But although an apprentice, previously bred to the sea, cannot be reclaimed, the apprentice-fee is wholly exigible if he enter the service voluntarily.⁸ The Mutiny Act, passed annually, requires the observance of certain formalities in order to entitle a master to reclaim his apprentice, if he shall enlist in the service of Her Majesty, or shall be serving in the embodied militia; but these it seems unnecessary here to state in detail.

CHAPTER II.

THE
SUBMISSION.

I NEXT notice the object and terms of the Submission.

A submission is a contract between two or more persons, by which they submit or refer some particular question or questions, or generally all questions existing between them, to the final decision of one or more individuals named by them as arbiters or referees, that is, to the decision of a particular judge or judges, chosen by themselves, whose judgment is to be final and without appeal. And the parties bind themselves to

¹ Macgregor, 31st May 1825, 4 Sh. 51.

² Gentle, 9th July 1825, 4 Sh. 163.

³ Stewart, 21st June 1832, 10 Sh. 674; and continuation of same case, 21st May 1833, 11 Sh. 628.

⁴ Wrights, 27th June 1742, M. 586; Stewart, 26th Nov. 1778, M. 587, note.

⁵ Cunningham, 19th January 1796, M. 600.

⁶ Turnbull, 26th June 1793, M. 599, and Cunningham above cited, M. 603, note.

⁷ Smith, 23d June 1814, F. C.

⁸ Arbuthnot, 19th Jan. 1694, 4 Br. Sup. 127.

abide by, and fulfil, the arbiters' decision or judgment in the submission.

The settlement, by way of submission, of disputes which are suitable for that mode of arrangement, ought to be conducive to harmony and good feeling. But submission is not adapted to every kind of dispute. I thoroughly agree with Professor Menzies' view that, when a point of pure law is involved, parties are best in the hands of the ordinary legal tribunals; unless the patrimonial interests at stake will not afford the consequent expense, in which case such a point will be best in the hands of a well-selected referee. WHEN
EXPEDIENT.

Where, again, the subject-matter consists of involved accounts, or points requiring investigation by a man of business or of skill, a reference is both suitable and advisable, because, even if the case goes into Court, there must be a remit to a professional man to investigate and report to the Court; and time and expense may be saved by going straightway into the hands of such party. There are also many disputes of a private nature, as to which the ordinary tribunals are objectionable, because of the publicity of their proceedings and judgments, and to these questions arbitration is in general peculiarly suitable.

A submission, however, is not likely to be satisfactory in its results, unless the parties select an arbiter possessing competent intelligence, firmness of purpose, and, of course, the highest integrity. And a submission will, in general, be unsatisfactory if the parties do not fairly co-operate with the arbiter, in conducting the proceedings with a view to the full discussion and expiscation of the whole matter, and are not prepared to submit to the deliberate award of their own selected judge, just as they would necessarily be to the final decision of an ordinary Judge.

The principle of submission, then, is unquestionably to be regarded with favour, wherever the case to be settled is of a suitable nature; but there is nothing talismanic in the private, as compared with the more public tribunal; and the duties of the parties to each other, and to the arbiter, as well as his to them, require to be both appreciated and fulfilled, in order to the submission having either a more satisfactory or a more amicable result than a lawsuit.

It is not decided that there must be a written deed of submission VERBAL
SUBMISSIONS. when the dispute relates to trifling and simple matters. But unquestionably, when the subject-matter is of importance, and still more when complicated, the submission can be proved only by writing. In an early case,¹ effect was given to a verbal reference, and verbal decret-arbitral. But in a later case² it was found that an alleged verbal submission could not be proved by parole evidence. Home's case was here founded on in support of a verbal reference, but unsuccessfully. A similar decision was given in the case of Ferrie.³ In this last case the sum in dispute

¹ Home, 7th Feb. 1671, M. 8402.

² Fraser, 24th June 1773, M. 8476.

³ Ferrie, 5th June 1824, 3 Sh. 113.

REGULATIONS
OF 1695.

was £414, and what took place at advising is thus reported:—‘The Judges considered it unnecessary to decide whether there might not possibly be cases of so simple and trifling a nature as to admit of parole evidence of a submission; but they were unanimously of opinion that, in the present case, it was an incompetent mode of proof; and it was observed that the case of Home had occurred prior to the Regulations of 1695.’ These Regulations, to which we shall afterwards have to refer, were framed by the Lords of Session, acting, not in their ordinary capacity, but as Commissioners, under a Royal Commission issued to them in 1693 ‘for Regulation of Judicatories;’ and, by No. 25, their Lordships declared that decreets-arbitral, following on ‘subscribed submissions,’ should not be open to reduction on any ground except corruption, bribery, or falsehood, alleged against the arbiters. It would appear that previously such decrees had been considered open to reduction on their merits, and it was intended to make reduction on the merits incompetent, and to make decrees following on ‘subscribed submissions’ final, if fairly and honestly given. The Regulations, however, extend only to subscribed submissions, and cannot be founded on in favour of any others. But there may be a valid reference without a regular deed of submission. Nothing is more common than to find a clause operating as a submission in a contract of copartnery, lease of minerals, etc. To such references the Regulations clearly extend.

PARTIES TO THE
SUBMISSION.

The parties to a submission are usually named and designed in the introductory clause. Where, however, the parties are numerous, as in the case of the division of a commonty, or similar deed, their general character will be pointed out in the opening clause, and their full names and designations given in the testing-clause.

COMPANIES.

As regards the capacity of parties to enter into a submission, the rules already stated, in reference to deeds in general, may be referred to. A submission by a woman has been said to fall by her marriage, unless her husband shall consent, and become a party to it for his interest; and in the case of a company, the extrajudicial settlement of disputes being an act of extraordinary administration, which it is not presumed that the partners as a body have committed to each of themselves separately, one of several partners cannot bind his copartners by signing for himself and the company.¹ In entering into a submission with a company, therefore, it is necessary to see that each of the partners either executes or authorizes the execution of the deed for him.

AGENTS.

It is not within the ordinary powers of agents and factors, as such, to enter into submissions on behalf of their constituents. Express power is necessary for that purpose. A law-agent, without such power, made a reference of a depending action, and bound his constituent to implement the referee’s award, and, the constituent having repudiated the reference, the agent was found liable personally in implement.² An agent is personally liable also when—the party for whom he acts being

¹ Lumsden, Nov. 1728, M. 14,567.² Livingston, 23d Feb. 1830, 8 Sh. 594.

an Englishman—he (the agent) binds not his constituent, but himself as acting and taking burden for him, that the decret shall be implemented.¹ A factor *loco tutoris* appears to have power to enter into submissions, at least as to questions which are the proper subject of such an agreement.² So also may a curator *bonis*.³ The questions in the cases here noted were simply of accounting.

After the introductory clause follows the submitting clause, which points out and specifies the subject-matter of the arbitration, and names the arbiter or arbiters, and, it may be, an oversman, who, when there are two arbiters, is to act in case of their differing in opinion. SUBJECT-MATTER.

The subject-matter may be either all unsettled claims and questions subsisting between the parties, in which case the deed is called a general submission; or a depending process; or some other particular question or questions, in which last case it is called a special submission; or it may partake of both the general and special. A general submission will usually require no narrative, except that the parties have determined to settle all disputes and differences between them by arbitration. When the submission is special, a narrative will, in most cases, be advisable. You will find forms, with and without the narrative, in the Juridical Styles.⁴

Our institutional writers have expressed different opinions on the question, whether a general submission is capable of comprehending questions regarding heritage. Bankton⁵ holds that it is not, and Erskine⁶ that it is. All doubt as to that point ought to be excluded by the terms of the submission. HERITAGE.

Generally the submission alone will be looked to, in any question as to what it embraces. We have a case where a general submission followed after a depending process, and where it was held competent to refer to the proceedings in such process, in a question as to what had been referred to the arbiters.⁷ Some Judges, however, have disapproved of this decision; and the general rule is hardly to be considered as trenched on by the case of Renton,⁸ where a submission was read along with a previous agreement, in order to ascertain its extent. In that case the agreement actually contained the submission and named the arbiter; there was subsequently a separate general reference by the parties to the referee, but this last deed was held merely supplementary, and in fact unnecessary.

The importance of care in describing the subject-matter of the submission will be shown by the case of Pitcairn.⁹ In that case a general

¹ Woodaide, 4th February 1848, 10 D. 604.

² Falconer, 17th February 1792, M. 16,380.

³ Corson, 10th July 1835, 13 Sh. 1093.

⁴ Style Book, ii. 163, 165.

⁵ Bankton, i. 23. 7.

⁶ Erskine, iv. 3. 32.

⁷ Steele, 22d June 1809, F. C.

⁸ Renton, 9th June 1847, 9 D. 1209.

⁹ Pitcairn, 24th May 1822, 1 Sh. 432; affirmed 20th May 1825, 1 Wil. & Sh. 194.

submission between a landlord and his tenant, who was removing thirteen years before expiry of the lease, was held to authorize a finding by the arbiters of a large sum as due by the landlord to the tenant, on account of prospective benefits to arise to the tenant from meliorations executed during the earlier years of the lease; a point which, the landlord contended, was not meant to be submitted. And the importance, not merely to constituents but to professional character, of framing the deed accurately and clearly, is illustrated in a case¹ where the subject-matter was left doubtful by the terms of the deed; and Lord Fullerton complained that the deed was ambiguous and defective, the common rules of grammar, and ordinary sequence and connexion of language, being disregarded.

GENERAL AND
SPECIAL SUBMIS-
SION.

Where the submission is both general and special, the general will not authorize the arbiters to decide upon claims or rights of a kind different from, or more important than, those mentioned in the special clause.²

NOMINATION OF
ARBITERS.

The next particular in the submission is the nomination of the arbiter or arbiters, a point on which the satisfactory result of the adoption of a submission mainly depends. Where both parties have full confidence in one and the same person, there will of course be only one arbiter; an arrangement extremely desirable wherever it can be accomplished. The appointment of a single arbiter, however, is often unattainable, and then there is nothing for it but to name two, one on each side, in which case a third party, called an oversman, ought to be named, with power to decide the points in dispute, in the event of the arbiters differing in opinion.

ARBITERS'
INTEREST.

The arbiters, being judges, ought to be clear of all interest in the subject of the submission, and of all suspicion of partiality. But interest, if known to the parties when they entered into the submission, is not an objection to the decret-arbitral.³ Interest emerging to the arbiter, after his nomination, will disqualify him.⁴ But it is not a change of circumstances sufficient to set aside the arbiter, in a submission, between a railway company and one of the contractors for their works, that the arbiter, having been the company's engineer when the reference to him was entered into, had subsequently become their manager.⁵ A submission to an advocate, as arbiter, does not fall by his elevation to the bench.⁶

ARBITERS MUST
BE EXPRESSLY
NAMED.

It is, however, essential to the submission of an ordinary dispute or difference, that the arbiters shall be expressly named by the parties. The principle, on which the above point was settled, has been explained thus:—The country has provided tribunals for the settlement of all differences and questions. If, by a full and complete agreement, parties have for themselves selected a different tribunal, the Court will

¹ The Aberdeen Railway Company, 28th Jan. 1851, 13 D. 527.

² Erskine, iii. 4. 9.

³ Johnstone, 8th July 1817. 5 Dow's App. 247; see also Trowsdale, 15th Nov. 1865, 4 Macph. 31.

⁴ M'Kenzie, 19 December 1828, 7 Sh. 215; Tennent, 16th June 1836, 14 Sh. 976.

⁵ Phipps, 11th March 1843, 5 D. 1025.

⁶ Fisher, 16th July 1844, 6 D. 1286. See Bell on Arbitration, p. 123, *et seq.*

give effect to their choice, and will enforce their agreement on that point. But the reference must be complete, otherwise the Court will hold either party entitled to resile, as from a bargain or agreement not concluded. In a contract for building a parish church, there was introduced a general submission of all differences, with respect to the meaning of the contract, or the execution of the work, to and, in the case of his death, to two persons of skill and character to be named by the respective parties. This was found ineffectual, no arbiter being named.¹

It is not enough to appoint as arbiter the holder for the time of any particular office, as the Lord Advocate, the Dean of the Faculty of Advocates, the Master of the Merchant Company of any town, or the like. In a proper submission, the arbiter must be individually named. In a contract of copartnery for foreign trade and insurance, entered into by merchants in Glasgow, there was a submission of all disputes relating to the affairs of the company to the Chairman, Deputy-Chairman, and Secretary, for the time being, of the Chamber of Commerce and Manufactures of Glasgow, or any two of them. This was held incomplete, and not obligatory.² In this case, it was observed on the Bench, 'The difficulty in supporting the plea of the defender' (in favour of a submission of the above description), 'arises from the reference being not to an individual, but to a description of persons, who,—as well as the point to be decided,—must necessarily have been indefinite at the date of the contract.' 'Supporting such clauses would virtually create a new Court.' The decision in the case was unanimous. A submission to A. and B., whom failing to any person to be named by the sheriff of the county, is equally ineffectual, after the death of A. and B.³

An exception, however, is introduced by Statute, in the case of disputes arising in friendly societies, and which, by the regulations of the society, are to be settled by arbitration.⁴ The Act for regulating such societies⁵ enacts that disputes between members, or otherwise, arising within the societies, shall be settled in manner directed by the rules of each society,—and makes special provision as to any direction in such rules, to refer disputes to the Justices of the Peace. There is a further exception, in the case of certain disputes between masters and their workmen, which, by the Act 5 Geo. IV. cap. 96, are to be settled by arbitration, on the demand of either party. And an essential distinction obtains, as to the necessity for naming the arbiter, between the submission of an ordinary dispute or difference, and a case where the parties

HOLDER OF
AN OFFICE.

EXCEPTIONS
FROM RULE
REQUIRING
ARBITERS TO
BE EXPRESSLY
NAMED.

¹ Davidson, 28th Feb. 1810, F. C.

² Buchanan, 25th June 1799, M. 14,593; an authority which Lord Wood, in the case of Hendry's Trustees, says is not contradicted by the Edinburgh Oil Gas Light Company, 28th June 1832, 10 Sh. 723.

³ Hendry's Trustees, 28th May 1851, 13 D. 1001.

⁴ Cooper, 11th March 1825, 3 Sh. 649.

⁵ 18 & 19 Vict. c. 63, s. 40.

to a contract agree to leave to arbiters to be named the extrication or liquidation of specific points, which must or may arise at some future period in connexion with such contract. The agreements in such cases, though partaking of the nature of submissions, do not relate to proper disputes or differences, and are so incorporated with the contract as to require to be worked out in the prescribed manner, in order to give the contract due effect. This distinction, in such cases, is now definitively recognised.

On this principle, the agreement, in the lease of a farm, that, on the landlord resuming possession, the farm-stock should be transferred to him by the tenant, at a valuation to be made by referees to be named by the parties, was held to bind the parties to settle the valuation by naming referees, when the time for making the valuation arrived.¹ And an agreement in a similar lease, that the value of land to be resumed by the proprietor should be fixed by men mutually chosen, was held to bind the parties to concur in naming referees.² Again, in a lease of coal, an agreement that the lease should be void, after nominees, to be mutually chosen, should report that the coal could be no longer worked to advantage, was held to bind the parties to choose men of skill to inspect and report.³

In the reports of Smith's case, and the case of Hendry's Trustees before cited, the authorities on the subject, both of the agreements to refer we are now speaking of, and generally of references to arbiters not named, will be found. The distinction between the cases is there clearly brought out. It would, indeed, be a very great practical evil if such agreements were not effectual. In Smith's case, Lord Cockburn, Ordinary, says, 'The enforcement of such obligations, even where the arbiters are not named, and the dispute has not arisen, rests upon far sounder principles of common sense than the defeating them does ;'—Lord Mackenzie says, the case is one 'where neither the one party, nor the other, knows the value of the particular subject, and where it is necessary that they shall have a valuation. A reference in such cases, made beforehand in order to make a bargain, differs,' etc. ;—and Lord Fullerton says, 'Where the price is to be fixed by reference, that is not a dispute arising between the parties, but something necessary to liquidate part of the contract.' 'When the reference is essential to liquidate the obligation come under by the party, it is good, though to a person not named.' And, when the cases allowing the distinction are looked into, it will be seen that, in all of them, it would have been necessary or suitable for the Court to remit to men of skill, such as the parties themselves had agreed to name. The Court therefore merely sanctioned the doing by the parties what they would themselves have had to do if the parties did not. Should the parties refuse to make a

¹ Munro, 18th Dec. 1823, 2 Sh. 593.

² Smith, 28th Feb. 1843, 5 D. 749.

³ Dixon, 25th June 1830, 8 Sh. 970.

See, to the same effect, Merry, 15th July 1859, 21 D. 1337 ; affirmed 26th March

1863, 1 Macph. (House of Lords) 14.

nomination in terms of their agreement and obligation, the Court apparently will do so for them.¹

Although the law is, as now stated, opposed to the efficacy of an agreement or obligation to refer an ordinary dispute or difference, where the referee is not named,—the practice of making clauses of reference is very common in cases where it is customary so to settle emerging questions; and the practice is beneficial, as calculated to promote an amicable mode of settlement, especially in connexion with agricultural leases. I therefore concur with Professor Menzies in recommending the clause,—but there should be conjoined with the general obligation or agreement the nomination of a referee, or of successive referees, where the parties can agree upon them, because thereby the settlement by reference may be made secure.

The submission,—after appointing the arbiters and oversman, or after the power to name the oversman,—contains the following clause: ‘With power to the said arbiters, or oversman, to receive the claims of the parties, take all manner of probation they may think necessary, either by writ, witnesses, or oath of party, for determining the matters submitted, and to hear the parties thereon.’ That clause gives, in the form of a power, a general view of the duties of the arbiters, and of the course of procedure under a submission.

The deed of submission, immediately after its execution, ought to be laid before the arbiters. They ought then formally to accept the reference by a minute (which had best be indorsed on the deed), and name their clerk, who should be wholly disconnected with the parties to the submission. The deed of submission should be placed in the hands of the clerk, who will also be custodian of the proceedings, as the clerks of Court are of those in ordinary processes.

Where the terms of the submission sufficiently disclose the nature of the claim, it is not necessary for the parties to lodge claims after the reference is accepted.² In all other cases, the arbiters, at the same time that they accept, ought to appoint the parties to lodge their claims within a short specified time, and, having perused the claims, they should order answers if necessary, hear the parties, receive their evidence (except where the reference is to a man of skill, and it may be his duty to refuse to allow a proof), and generally make themselves thoroughly acquainted with the case, and with the views of the parties; and the arbiters’ notes or minutes should be so framed as to instruct that they have not failed in their duty in these respects. They ought also, throughout the proceedings, to be specially careful to hold no communication of a private nature relative to the submission with any of the parties, and to remember that (in the words of Lord Chancellor Eldon, to whom, as regards the law applicable to submission, Scotland is very deeply indebted) they are ‘judges, and though one is chosen by one party, and another by another, each is not to act merely for the

¹ See Munro’s case before cited.

² Ledingham, 16th Dec. 1859, 22 D. 245.

POWERS AND
DUTIES OF
ARBITERS.

ACCEPTANCE
OF ARBITERS,
AND NOMINA-
TION OF CLERK.

'interest of the party by whom he is named. Arbiters, by whomsoever named, ought to be perfectly indifferent between the parties. They owe to the particular parties duties of the same nature as those which the King's Judges owe to His Majesty's subjects in general, though not named by them.'

The arbiters, it will be observed, are empowered to hear the parties, and take proof; and, as a general rule, hearing the parties, and receiving all relevant evidence offered by them, is indispensable.

GROUND OF
REDUCTION OF
DECREET-
ARBITRAL.

By the 25th article of the Regulations, before referred to, framed on 2d November 1695 by the Lords of Session, acting under a Royal Commission, as before explained, it was ordered that, for the cutting off of groundless and expensive pleas and processes, the Lords of Session should sustain no reduction of a decret-arbitral, pronounced upon a subscribed submission, upon any cause, except that of 'corruption, bribery, or falsehood,' to be alleged against the judges-arbitrators.

These Regulations were approved by the King on 29th April 1695, and declared to have full force, etc., and they have been declared to have statutory force, and be as binding as a Statute, power having been delegated to the Court by the Legislature to make them, and they having afterwards been adopted by the Legislature.¹ But the Regulations were never intended to interfere with the general principles of law and justice applicable to all agreements, and they are not allowed so to operate. The words 'bribery and falsehood' have a definite and limited meaning. But 'corruption' has been dealt with differently. It has received a very broad construction, reaching any plain failure in duty, any misconduct distinct from an error in judgment.²

ARBITER MUST
DEAL EQUALLY
BETWEEN
PARTIES.

Independently altogether of the Regulations, fair and equal dealing on the part of arbiters, as private judges, is plainly essential. In the case of Sharpe, to be afterwards noticed, where the arbiter thought that both parties had led all their evidence, whereas one of them only had done so, and the other had not, Lord Eldon, when pronouncing judgment, said that 'by the great principle of eternal justice, which was prior to all these Acts of Sederunt, Regulations, and proceedings of Court, it was impossible that an award could stand where the arbitrator heard one party, and refused to hear the other. And on this great principle, and on the fact that the arbitrator had not acted according to the principle upon which he himself thought he ought to have acted, even if he decided rightly, he had not decided justly, and therefore the award could not stand.' Again, in a case where the objection was that both parties had not been allowed to lead their evidence, Lord Fullerton says, 'An arbiter may, in some cases, think that his own information is sufficient to enable him to do justice.' 'But, most unquestionably, if he hears one party, he cannot refuse to hear the other.' 'Whether his not doing so can be brought under the head of "corruption," or is to be viewed, perhaps more justly, as a breach of an implied condition in all submissions, it

¹ Mackenzie, 9th March 1843, 2 Bell's App. 43. ² Bell on Arbitration, p. 37, *et seq.*

‘is unnecessary to inquire.’ ‘The competency of challenging a decreet-arbitral on such a ground must be considered as a fixed principle of our law.’

In conformity with these principles, decreets-arbitral were reduced by the House of Lords in the case of *Sharpe*,¹ and by the Court of Session in the case of *Mitchell*.² In the former case, the arbiter had required the parties to admit, in writing, that they had nothing more to offer, and that they desired a decision on the case as it stood; and he proceeded to decide under the impression that a letter of admission to that effect had been signed by both parties, the fact being that one of the parties had material evidence to adduce, and had not joined in signing the letter of admission. In the latter case, the arbiter had allowed both parties a proof, which had to be taken in part at Bombay. Both parties having sent their instructions to the same solicitors at Bombay, the proof there miscarried. A renewal of the commission to take the proof was thereupon applied for by one of the parties, but refused; and the arbiter proceeded to decide, narrating, in his decree, that he had ‘considered the proof taken,’ which, however, was almost all on one side. The Court were clear that if an arbiter examines on one side, as to any particular fact, he is bound to admit the evidence tendered on the other side as to the same fact; Lord Jeffrey saying, ‘The true principle is, that the ‘decreet-arbitral can stand only when the arbiter has done his duty ‘fairly. I do not mean fairly in reference to his moral dispositions; but ‘he is bound to show this Supreme Court that he has dealt fairly, that ‘is equally, with both parties. Otherwise, it must be held that he has ‘violated the contract of submission.’ Decisions on similar grounds were pronounced in the cases noted below.³

Wherever, therefore, proof is necessary to the due appreciation of the PROOF. subject of dispute, proof must be allowed; and failure to receive proof will be a ground of reduction of the decreet-arbitral. In the words of one of the Judges, ‘a submission does not give an arbitrary power to commit injustice.’ But in a special case, very suitable for arbitration, in which claims were lodged, and thereafter the parties themselves were heard, the arbiters rejected an offer of proof made by one of the parties, though it was averred that such proof was necessary for the proper disposal of the case; and the Court, in the circumstances, refused to reduce the decreet, holding that the arbiters, after seeing the claims and hearing the parties, must have a large discretion in judging whether to receive evidence or not.⁴ A decision, on the same principle, was pronounced by a small majority of the Court in another case.⁵ And the point referred may be one in which the arbiter is selected because of his skill in that particular department. In such case the refusal of evidence may be no

¹ *Sharpe*, 24th Feb. 1815, 3 Dow’s App. 488; *Earl of Dunmore*, 28th Jan. 1835, 102; reversing the judgment of the Court 13 Sh. 356.

of Session, 5th June 1810, F. C.

⁴ *Mowbray*, 2d June 1848, 10 D. 1102.

² *Mitchell*, 17th June 1848, 10 D. 1297.

⁵ *Miller & Sons*, 10th March 1855, 17

³ *Heggie & Co.*, 1st Feb. 1825, 3 Sh. D. 689.

refusal of justice; and it is for the arbiter to say whether he will hear the evidence of the skilled persons, tendered with a view of influencing his own judgment.¹ This principle was again acted on in a later case.² This was the reduction of the award of an arbiter, fixing the value of coal left unsold by the tenants at the expiry of a lease of coal; and reduction of the decret-arbitral was brought, on the ground that it had been pronounced without hearing parties. But the Court held that, in that case, the duty of the arbiters was an exercise of skill; and that, in the circumstances of the case, it was not a relevant ground of reduction that parties had not been heard.³ Where, however, there is a reference to men of skill, they are not limited to the evidence of their own senses. They can conduct the inquiry in any way they think proper.⁴

As regards the taking of proof,—‘all manner of probation,’—the arbiters being merely private judges, and their judicial authority being only what the parties can give them, they cannot of themselves compel the production of papers by third parties, nor the attendance of witnesses, however necessary to the progress of the submission. This want of power, however, will be supplied by the Court of Session or Judge Ordinary, on summary application of the arbiters, or of the parties themselves.⁵ The witnesses must attend and answer, when so ordered by the Court, or they are liable to imprisonment for contempt of Court; they having always opportunity of showing cause why they should not obey the order; as, for example, on the ground of confidentiality.⁶

PROVISION
AGAINST LOSS
OF PROOF ON
THE SUBMISSION
EXPIRING.

We shall see that submissions may fail by death of party, or through expiry of the time limited for their endurance, or otherwise, in which event, if there is no special provision to the contrary, all proof taken in the submission will become unavailable. To prevent the loss of proof, therefore, duly taken, and that the expense and trouble of a submission which does not result in a decret-arbitral may not be thrown away, it is usual to provide in the submission, by a clause following the power to take proof and hear the parties, that all probation taken by the arbiters shall be held as legal probation in any after submission, or in any process relative to the subject in dispute, although the submission containing this provision shall happen to expire without a decret-arbitral.

OBLIGATION OF
PARTIES TO IM-
PLEMENT
AWARD.

After the power before quoted, as to taking proof and hearing parties, and the clause, if any, contingently extending the operation of the proof taken, there follows this passage: ‘And whatever the said arbiters or ‘oversman shall determine in the premises, by the decret-arbitral to be pronounced by them or him, betwixt and the day of

¹ Johnston, 10th July 1817, 5 Dow’s App. 247; Macdonald, 8th Dec. 1843, 6 D. 186.

² M’Nair’s Trustees, 16th Feb. 1855, 17 D. 445.

³ See also Ledingham’s case, before cited.

⁴ Cochrane, 3d Feb. 1859, 21 D. 369.

⁵ Harvey, 6th July 1826, 4 Sh. 809.

⁶ Blaikie, 2d March 1852, 14 D. 590.

‘next to come, or on or before any other day to which they or he shall prorogate this submission, which they are hereby empowered to do at pleasure, both parties bind themselves,’ etc.

This clause, together with the description of the subject-matter contained in the proper submitting clause, fixes the limit of the arbiters’ powers, the *finis* or *vires compromissi*, and regulates also the endurance of the submission.

And, first, the parties bind themselves to fulfil what shall be determined by the arbiters or oversman in the premises. As to this,—the submission being simply an agreement between the parties and the only authority under which the arbiters act,—the arbiters cannot, of themselves, go beyond what its terms authorize. They can decide only what the parties have submitted to them, and cannot exceed the powers given them. On this principle—that is, in respect of the arbiters having gone beyond their powers—the decreet-arbitral in Steele’s case, before cited,¹ was reduced. We have also another case of the reduction of a decreet-arbitral, as going beyond the subject of the reference.² The submission there followed upon and narrated the contract for building a steam vessel at a specified price. Extra work had been done, for which a specific sum was claimed; and the arbiter, disregarding the contract altogether, decerned for what he considered a fair price for the vessel, extra work included. This fair price exceeded the total amount of the contract price and claim for extra work, and no explanation of the details or items of which it was composed was given. In these circumstances, the Court unanimously reduced the decreet, as *ultra fines compromissi*; Lord Ivory saying, as to the decreet, ‘Nothing could be so unsatisfactory as the slumping manner, without explanation or detail of any kind, in which he (the arbiter) appears to have arrived at his conclusions; at this moment, what he has sustained as price, and what as extras, is utterly inextricable.’

ARBITERS CAN-
NOT EXCEED
THEIR POWERS.

In another case, arising out of a contract with commissioners, for building a gaol, etc., the specification of the work and prices (engrossed in the contract) stipulated that, in the event of extra work being executed, the prices should be precisely similar to those by which the estimates of the specified work had been made up, and the whole should be adjusted by the architect appointed by the commissioners to superintend the operations. The contract further contained an agreement that, ‘In case any difference of opinion should arise, as to the true meaning of the contract, or of the execution of any part of the work contracted for, the same should be determined by the said A. B., sole arbiter hereby appointed by the parties.’ Extra work was done by the contractor; and the arbiter named in the above clause, who was the commissioners’ architect, holding the claim for that work to be a matter included in the submission, adjudicated thereon, and awarded a sum for the work to the contractor. Apparently, this sum was not made up according to the

¹ Steele, 22d June 1809, F. C.

² Napier, 29th Nov. 1844, 7 D. 166.

prices of similar work set forth in the specification. The Court reduced the decret-arbitral, as going beyond the submission. The clause concerning the extra work gave a complete direction as to the mode of ascertaining the price thereof, and there was nothing of the nature of a submission on that point. The amount was to be adjusted by the commissioners' architect, but the principles or rule of adjustment were specifically laid down. A. B., the arbiter named, happened to be the architect; but the architect might have been a different person, and the accident that he was not did not make his duty in adjusting the prices part of his duty as arbiter. The case was held to be more clear, because there were separate provisions as to the adjustment and the submission.¹

TOTAL OR PARTIAL
REDUCTION
OF AWARD.

An award which goes beyond the submission is not, in all cases, reducible *in toto*. The extent to which the reduction goes is in general regulated by the question, whether the award is articulate, and capable of being dealt with in detail; or is slumped, and requiring to be disposed of as a whole. Thus, where the parties in the submission bound themselves to implement the award under a penalty of £20; and the arbiter, besides awarding £200 as due by the one to the other, decerned for £40 (a fifth part more) of penalty, in case of failure, and £20 further of penalty, as allowed by the submission, the Court reduced the decret only as far as regarded the penalty of £40.² Again, where an arbiter awarded expenses, arising under a previous process, overlooking an exception expressed in the submission,—his award, though reduced as to that particular, was sustained as to the proper subject-matter of the reference.³ And where, upon a special reference, the arbiter had not only settled the special points, but had ordered mutual general discharges to be granted by the parties, the Court sustained the decret so far as regarded the special matter submitted, and reduced only as to the order for general discharge.⁴ But if the points before the arbiter are mixed up, or so connected with each other as not to admit of separate settlement, the decret-arbitral will fall *in toto*, if it cannot be supported *in toto*. Of this we have an example in Napier's case, before cited, and in the case of Reid.⁵

INTERIM
DECREETS
ARBITRAL.

The power of pronouncing interim decreets-arbitral may here be noticed, as a point requiring consideration in the preparation of a submission. If the circumstances admit, the power ought to be specially given; and it is accordingly usual, where the subject-matter of the reference is capable of separation, to authorize the issue of interim as well as final awards; and to declare that the interim decreets shall be good and valid, although no final decret shall be pronounced. Where such power is in the deed, an interim decret is clearly valid.⁶ And such decret will receive effect, though the submission shall termin-

¹ Birrell, 9th March 1859, 21 D. 640.

² Grosat, 24th Jan. 1739, M.'626.

³ Kidd, 19th June 1810, F. C.

⁴ Crawford, 25th Dec. 1702, M. 6835.

⁵ Reid, 15th Dec. 1826, 5 Sh. 140.

⁶ Lyle, 2d Dec. 1842, 5 D. 236.

ate without a complete decision of the whole matters referred.¹ Even without a clause of special authority, it would seem that, if the subject-matter be articulate, and capable of separation, an interim decret settling one or more particular points would be sanctioned.² That point, however, is not settled; and there is an old case, where, on a reference of mutual claims, a (final) decret settling the claims on one side only, leaving those on the other unadjusted, and referring the same to the Judge Ordinary, was reduced.³

The arbiters have likewise certain powers, which, though not expressly given, are incidental to the case or to their office, unless specially excluded. Thus, they have a reasonable discretionary power to obtain such advice and assistance as they may consider requisite for enabling them to perform the duty they have undertaken; and the parties are liable for the expense thus incurred.⁴ In Macleod's case, a party was found liable for the fee to an accountant employed by the arbiter. Again, when an arbiter employed a man of skill to survey and report, this was found not *ultra vires*, though there was not express authority to do so in the submission.⁵

It is now also settled that arbiters, though not expressly authorized by the submission, have power to award expenses to either party.⁶ They are likewise entitled to order payment of their clerk's account for fees and trouble.⁷ They are not, however, entitled, when acting under a regular submission, to claim fees for their own services. They are judges, exercising a *quasi* public function, and, in the absence of express stipulation on the subject, their remuneration must be entirely in the option of the parties. In a case⁸ where arbiters had decerned for a sum, including fees to themselves, Lord Hailes pronounced an interlocutor finding that, in that particular, they had exceeded their powers, and had done a thing of evil example.

But they may, before entering on the submission, stipulate for remuneration, and their doing so does not infer corruption.⁹ And in a very special case, where they were the ordinary law-agents of the parties, and made charges for trouble on that footing, openly, the Court held their doing so no objection to the validity of the proceedings.¹⁰ We have also a case in which an arbiter, employed to measure the mason work, etc., of a house, was found entitled to sue for a fee,—the object of the submission being to obtain the benefit of his professional skill and labour, on the exercise of which his daily subsistence depended.¹¹ But there was much difference of opinion on the Bench in that case, and subsequently a fee

¹ M'Kessock, 14th Nov. 1822, 2 Sh. 13; see also Taylor, 19th Jan. 1822, 1 Sh. 253.

² See the case of Lord Lovat, 22d June 1738, M. 625.

³ Wishart, 30th June 1635, M. 17,013.

⁴ Macleod, 17th Dec. 1825, 4 Sh. 330.

⁵ Caledonian Railway Co., 23d March 1860, 3 M'Queen, 808.

⁶ Robertson, 6th Dec. 1836, 15 Sh. 199; Ferrier, 28th Jan. 1843, 5 D. 456; affirmed, 18th April 1845, 4 Bell's App. 161.

⁷ Stewart, 21st Feb. 1822, 1 Sh. 335.

⁸ Jack, 6th March 1777, M. Arbitration, App. No. 5.

⁹ Fraser, 26th May 1838, 16 Sh. 1049.

¹⁰ Lyle, 2d Dec. 1842, 5 D. 236.

¹¹ Macallum, 26th June 1810, F. C.

was refused as a matter of right to an architect who had acted as referee in a professional dispute.¹ The Court were unanimous as to the general rule; the Lord Justice-Clerk Boyle saying that there are the soundest principles for it, in all proper arbitrations, not mere references. The arbiter performs the sacred office of judge, and he ought to be enabled to do so with purity and impartiality. There can be no doubt, however, that professional arbiters ought to be remunerated; and on that point agents ought, if possible, to see justice done them, and to prevent their constituents from acting against what their own good feeling would dictate, if it were not temporarily under some morbid influence.

**ENDURANCE OF
SUBMISSION.**

The next point we have to consider is the endurance of the submission.

When it is part of a lease, which is a real contract, it will subsist along with the lease, and be binding on the heirs and singular successors or assignees of the parties.² But, where the submission is merely a personal contract, it will fall by the death of either of the parties, unless it contains a special declaration that it is to endure notwithstanding such death; and, even with such declaration, if it is a mere personal contract, it will fall by the death of the arbiter, or of either arbiter if there are two, or by the death of the oversman, where there has been a devolution to the oversman in consequence of a difference of opinion between the arbiters.³

The principle, that the submission, when merely a personal contract, falls by the death of parties, is strongly illustrated by the case of Robertson,⁴ in which the interest in the submission had passed to an assignee, who wished to sist himself as a party, and proceed with the submission after the death of one of the parties, but was not allowed. And when a submission was entered into on behalf of a pupil by her tutors,—not simply as representing her, but as taking burden on them for her,—the death of one of the tutors terminated the submission.⁵ The tutors, by taking burden on them for their pupil, made themselves personally liable for her, and so patrimonially interested in the submission, and parties to it. In the same case the Court expressed their opinion, that as the ward, who was a female, had been married during the dependence of the submission, and her husband had acquired right to the sum in dispute, but had not been made a party to the submission, the proceedings of the arbiters subsequent to the marriage were inept. The principle was, that at every stage of the arbitration process the arbiter ought to have both parties before him, or at least to do all in his power for bringing both before him; and that in this case the proceedings (after the marriage) had been carried on with only one of the parties duly represented. On the

¹ Paterson, 19th Feb. 1819, reported in a note to Kennedy, 20th Jan. 1819, F. C., in which also a fee was refused.

² Montgomerie, 23d June 1848, 10 D. 1387.

³ Macanqual, 14th May 1563, M. 636.

⁴ Robertson, 6th February 1847, 9 D. 599.

⁵ Maitland, 18th May 1796, M. 641.

same principle, where one of the parties became bankrupt, and the trustee BANKRUPTCY. for his creditors, who after the bankruptcy were alone interested in the question, was not made a party to the submission, the decret-arbitral was reduced.¹ But the mere bankruptcy of the parties does not terminate a submission, any more than it does a lawsuit. The submission still subsists, though, in order that the decret may be effectual against the creditors, the submission must be notified to their trustee, that he may appear for his interest.² Neither does a submission fall, nor is it brought to a termination, by the institution of an action of reduction of it; and an effectual decret-arbitral may be pronounced, notwithstanding the dependence of such action.³ And where the decree pronounced in a submission is found inept, or is improbativ, the submission, if it has not expired by death of parties, or on some other ground, remains unexhausted, and may still be proceeded with, till the question submitted is disposed of by an effectual decret.⁴

It is usual, however, and proper, to make express provision on the subject of the endurance, by the deed, in the words before quoted. And it is further usual, and in most cases proper, to provide that the submission shall not fall by the death of the parties, but shall be binding on their heirs; a provision which will receive effect.⁵ The clause usually says that the submission shall not fall by the party's death, or bankruptcy; and, though an express clause is not required to save the submission in the case of bankruptcy, it is as well to adhere in that particular to the accustomed form.

When the endurance is expressed in the form above given, it is held YEAR AND DAY. to be for a year and day; and the omission of the words, 'next to come,' making the term run 'to the day of ,' does not extend the submission beyond year and day.⁶ It was held in Stark's case, and in the old case of Wallace,⁷ that the endurance was for a year only. But year and day are now allowed, on the authority of the case of Menzies,⁸ and of Lord Bankton,⁹ and likewise according to the analogous rule in regard to processes, which do not fall asleep till year and day from the date of the last interlocutor. This principle received effect in the case of the Earl of Dunmore.¹⁰ The year and day are reckoned from the date of the last subscription of the deed of submission, even though that shall be not of a principal party, but only a cautioner.¹¹

The arbiter's award, moreover, may be signed on the last day of the endurance of the submission.¹² And, where the time limited is not, as above, 'the day of next to come,' but betwixt

¹ Barbour, 21st Nov. 1811, F. C.

² Grant, 23d June 1820, F. C.

³ Abbott & Son, 12th May 1824, 3 Sh. 4.

⁴ Reid, 15th Dec. 1826, 5 Sh. 140; Bannatyne, 2d Dec. 1862, 1 Macph. 90.

⁵ Ewing & Co., 19th December 1820, F. C.

⁶ Stark, 23d December 1820, F. C., App. p. 3.

⁷ Wallace, 23d Feb. 1672, M. 639.

⁸ Menzies, Feb. 1665, M. 639.

⁹ Bankton, i. 23. 2.

¹⁰ Earl of Dunmore, 13th May 1829, 7 Sh. 595.

¹¹ Taylor, 25th Nov. 1800, M. App. Arbitration, No. 8.

¹² Wilson, 30th June 1694, M. 647; Paterson, 15th May 1829, 7 Sh. 616.

and a particular day specified, the day specified is itself included, and a decret may be validly pronounced on that day.¹

DECREET
BEFORE SUBMIS-
SION EXPIRES.

The arbiters, however, must actually complete their decret-arbitral, in every respect, before the term of the submission expires. They have no power except what is given them by the submission, and that may be limited by the deed as to time, as well as subject-matter. A decret pronounced after expiry of the submission is null, as proceeding from those whose functions are ended.² And an improbate minute of an intended decret, though announced to the parties in due time, will neither be effectual of itself, nor will it authorize the subscription of the decret-arbitral after the submission has expired. A decret pronounced in such circumstances was found null.³ The same was found in a case⁴ where the arbiters had come to their decision before expiry of the submission, and recorded it in improbate notes, from which they directed the clerk to extend a formal decret; but the decret was not signed before the expiry of the submission, and the Court held that the arbiters could not sign it after such expiry.

HOMOLOGATION
WHEN SUBMIS-
SION NOT PRO-
ROGATED.

When the submission is by letter of reference, without power of prorogation, but not specifying any term of endurance, it may be kept in force, even after several years have elapsed from its date, by the parties, in the full knowledge of its terms, acting as if it was a subsisting agreement.⁵ Where, however, there is a regular deed of submission, with power to prorogate, the parties will not be held as renewing or homologating the submission, by acting as if it was subsisting, if they were in ignorance of the fact that the power to prorogate had not been exercised *debito tempore*. It was so held by Lord Handyside, Ordinary, in Hopkirk's case,⁶ and his interlocutor was acquiesced in. The same result appears to be brought out by Stark's case, already cited, where the proceedings went on for two years after omission to prorogate; and in the case of Thomson,⁷ though not reported on this point, but referred to by Lord Handyside. And where the submission is part of an agreement, or of a lease, and applicable to questions to arise at some future time under the agreement or the lease, it is necessarily of equal endurance with the agreement or lease itself. In such case, all decreets pronounced by the arbiters before the completion of the agreement, or termination of the lease, are interim decreets; for in such circumstances it is not in the arbiters' power to pronounce a final decret.⁸

It is said by Erskine⁹ that a submission, if not limited as to time, will subsist, like any other agreement, for forty years; and Fleming's case, before cited, is referred to in support of that view. But that

¹ Cockburn's Relict, 31st Jan. 1724, M. 640.

² Donaldson, 26th Jan. 1770, M. Arbitration, App. No. 1.

³ Pitcairn, 2d Dec. 1680, M. 647.

⁴ Lang, 23d Nov. 1852, 15 D. 38; affirmed as to the above point, 8th May 1855, 2 Macq. 93.

⁵ Fleming, 7th July 1827, 5 Sh. 906.

⁶ Hopkirk v. Campbell, 17th Feb. 1854, not reported.

⁷ Thomson, 28th Jan. 1818, F. C.

⁸ Brysson, 10th June 1823, 2 Sh. 382; Halket, 16th Dec. 1826, 5 Sh. 154; and Montgomerie, 8th Dec. 1849, 12 D. 274.

⁹ Erskine, iv. 3. 29.

case, on which the opinions of the whole Court were taken, was decided, partly at least, on the principle of homologation, by parties fully aware of all the circumstances; and five of the Judges (then fifteen in all) were of opinion that a submission, even without a term, expired at the end of year and day. The long endurance, therefore, must be considered as at all events a doubtful question.

The clause respecting the endurance refers to prorogation, and sub-
missions may be prorogated by the parties, that is, the parties may extend their term of endurance by a writing, which may be endorsed on the submission, and which, when so written, requires no stamp in addition to that impressed on the deed of submission.¹ Or submissions may be prorogated by the parties *rebus ipsis et factis*; for example, by their pleading before the arbiters, or otherwise (whilst in the full knowledge of the fact that the term of the submission has expired), in a way consistent only with the continuance of the submission.² It is also in most cases advisable to give power of prorogation to the arbiters and oversman; the oversman, of course, having no power until after devolution to him. The clause containing the power to prorogate has been already quoted. But in special circumstances power of prorogation has been held as given to an arbiter, without an express clause.³

When the prorogation is by the arbiters, or oversman, it is unnecessary that the writing be executed with the solemnities of a probative deed. It is a step of procedure *in causa*; a semi-judicial act; and is sufficiently authenticated by the writing of the clerk, and the arbiters' or oversman's signature, without further solemnity.⁴ In Gordon's case, the objection, that prorogations so written could not prove their own date, was overruled. And, if the arbiters have power to prorogate, they may exercise their power at a time when one of the parties may be unrepresented; for example, when one of the parties, being a trustee in a sequestration, had died, and his successor (who was bound to be a party to the submission) had not been appointed.⁵ In the case of Ewing and Company, power was expressly given to prorogate, without consent of the parties; but the power to prorogate, when given, can clearly be exercised without consent of, or even notice to, the parties. Prorogation is a purely judicial act in the absolute discretion of the arbiters or oversman. Therefore the parties do not require to be heard on it. In this case, the effect of waiting for their appearance would have been to let the submission expire.

The Prorogation, like the submission, is usually made to extend to 'the day of next to come.' It continues the submission for a year and a day, during which time the powers of the arbiters or oversman remain as they would have been, if the original term named

¹ Paterson's case, already cited, 7 Sh. 616.

² Fleming's case, before cited; see also on the above point Menzies, p. 397.

³ Gowans, 3d Feb. 1859, 21 D. 403.

⁴ Stewart, 8th March 1804, M. 16,911; Gordon, 10th Dec. 1812, F.C.

⁵ Ewing & Co., before cited.

in the submission had been still current. And there may be successive prorogations, so as to keep the submission in force, from time to time, as long as the arbiters or oversman are acting.

**APPOINTMENT
OF OVERSMAN.**

We have now to consider the appointment of the oversman.

The principles affecting the choice of the oversman are the same as those applicable in the case of the arbiters. In general, it is desirable that the parties should themselves name the oversman in the deed of submission; and you will find the form for that purpose in the Juridical Styles.¹ The oversman is only to act in case of the arbiters differing in opinion; but it is no objection that he be appointed before any difference of opinion shall arise.² Indeed, it is the safer course, in all cases, to name him before the submission is entered upon; otherwise, there is the risk that, in case the arbiters differ regarding the award to be pronounced, they may equally differ as to the party suitable to be oversman.

**POWER TO
APPOINT.**

This contingency was had in view in the general Acts passed in 1845, authorizing the settlement by arbitration of land claims affecting railway and other public companies; these Acts requiring that, when more than one arbiter should be appointed, the arbiters should, before entering upon the submission, appoint an oversman to decide on any matters on which they should differ.³ In regard to this, as well as other matters, however, arbiters or referees have no power except under the submission; and, in order to their naming an oversman, it is essential that express power be given them by that deed.⁴ But, supposing them to have power, they may name him at any time whilst the submission subsists. He must be the intelligent choice of both arbiters. In England, the appointment of an oversman by one of the arbiters only, after tossing up to settle which of the two should have the nomination, was held void. But, on the other hand, where both arbiters fixed on two persons as each suitable for the office of oversman, and tossed up which of these two should be named, the appointment was sustained. Here the selection was in fact the act of both arbiters; both persons were fit to be oversmen,—and the very questionable expedient of the toss-up was resorted to only in order to settle which of the two fit persons should be named.⁵

DEVOLUTION.

The appointment is made by a writing called a devolution, which, like the prorogation, is sufficiently authenticated when written by the clerk and subscribed by the arbiters, and does not require the solemnities of a deed.⁶ There must, however, be either an original nomination, or a devolution. In a case where a party, to whom the arbiters, after differing in opinion, had appealed for a decision of their difference; and

¹ Style Book, ii. 163.

² Brysson, 10th June 1823, 2 Sh. 382.

³ See 8 & 9 Vict. c. 19, s. 26.

⁴ Matheson, 1st July 1842, 4 D. 1472.

⁵ Jarman & Bythewood's Conveyancing, ii. 671.

⁶ Stewart, 8th March 1804, M. 16,911; Kirkaldy, 16th June 1809, F. C.

where that party, without any appointment, had proceeded to issue a decret-arbitral, in the character of oversman,—the Court reduced the decret.¹

The powers of the oversman, at whatever time appointed, are contingent on the existence of difference in opinion between the arbiters; and if no difference arises he cannot act. On the other hand, if there is a difference, and he is previously named, the occasion arises for devolving the submission on him. But, if it does not appear distinctly that he acts in consequence of the arbiters having differed in opinion, his decret-arbitral will be set aside.² The difference of opinion, however, has been held to be proved by the *res gestæ*, without any regular minute.³ In the case of Middleton,⁴ the arbiters, after taking proof and hearing parties, had fixed to meet on a certain day to decide the case, and, having met, one of them gave his opinion, and the other declined to give any opinion; which facts were certified by a notarial protest instantly taken. The oversman thereafter proceeded to pronounce his award, in which he narrated that the arbiters had differed. The House of Lords, reversing the decision of the Court of Session, sustained the award. This case shows the importance of the appointment of the oversman at the outset. And the same point, as well as the importance of the choice of suitable arbiters, is likewise shown in another case,⁵ where it was found that one of two arbiters, who refused to act, in respect the question turned on points of law of which he was not competent to judge, could not be forced either to pronounce an award, or to choose an oversman.

When the oversman is appointed, and when a difference arises between the arbiters, the submission is devolved upon the oversman as sole judge. If the difference extends only to certain particular points, the devolution can embrace these only and nothing more. If the whole matters in the reference are open, and the case does not admit of settlement in detail, the whole must be devolved, and it is usual, when the whole is open, to devolve the whole. But even in that case, if the nature of the questions admits, the devolution may be only partial, and the powers of the oversman will be limited accordingly. In particular, his power of prorogation will extend only to what is embraced in the devolution, even though the result will be that the submission falls as to the other points.⁶ In Lang's case, the arbiters had agreed on certain points, as to which the submission was not devolved to the oversman. They omitted to issue their award as to these points timeously, and it was then pleaded, but unsuccessfully, that a prorogation by the oversman (which was made in due time) applied not only to the points devolved to him, but to all the other unsettled points.

Where power of prorogation is given to the arbiters, the oversman,

¹ Telfer & Co., 31st Jan. 1823, 2 Sh. 167.

⁵ White, 7th July 1796, M. 633.

² Gordon, 30th Nov. 1716, M. 655.

³ Gardner, 19th Jan. 1773, M. 659.

⁴ Middleton, 9th June 1721, Robertson's cases, 391.

⁶ Lang, 23d Nov. 1852, 15 D. 38; reversed 7th & 8th May 1855, 2 Macqueen 93; Bell on Arbitration, 196.

POWERS OF
OVERSMAN.

CONTINGENT ON
DIFFERENCE OF
OPINION.

SUBJECT-
MATTER OF
DEVOLUTION.

though he may not be expressly authorized, has the same power after the devolution to him takes place.¹

**CLAUSE OF
REGISTRATION.**

After the clauses we have already gone over, the submission will next contain consent by the parties to registration in the Books of Council and Session, or others competent, of the submission, prorogations, and devolution, if any, and likewise of the decreets-arbitral, interim or final, to follow thereon, for preservation and execution. This clause may be in the short statutory form, but it ought expressly to apply to prorogations, devolution, and decreets-arbitral.

Such consent is indispensable, with a view to summary diligence on the decret-arbitral, which cannot proceed unless the parties have authorized it. Here, again, the powers of the arbiters are limited by the express terms of the deed appointing them.

And the submission requires a testing-clause, with all the formalities applicable to ordinary deeds.

**JUDICIAL
PROCEEDINGS
INCOMPETENT.**

I may here notice, as one of the most important particulars to be kept in view with reference to a submission, that, though voluntarily gone into, it is, nevertheless, a complete tribunal, from which the parties are not entitled, directly or indirectly, to withdraw. They cannot, therefore, whilst the submission endures, resort to the ordinary judicial tribunals as to any matter embraced in the submission.² Neither can they, pending the submission, do diligence as to any such matter. It is accordingly incompetent to give a charge for payment of the price of a subject sold, pending disputes regarding the terms of the conveyance, which have been submitted to arbitration.³

It is not sufficient to authorize suspension of the proceedings, that there is a judicial challenge, by one of the parties, of the arbiters' integrity.⁴ The Court have a strong reluctance to interfere during the dependence of the submission, unless upon specific averments inferring corruption.⁵ Lord Brougham, referring to the contingency of a case of gross corruption, says, 'I can well imagine that the Court of Session ' would be justified in sustaining the reasons of a declarator and interdict, ' and stopping a going submission. But nothing of the sort occurs in the ' present case.'

DELAY.

A further point, of great practical difficulty, sometimes arises, when the arbiter is dilatory, and perhaps neglecting, or at least forgetting, his duty. Being a judge from whom there is no appeal, the parties are naturally unwilling to press him unnecessarily; but, on the other hand, it may be almost intolerable that his judgment should be indefinitely postponed. Such cases require to be dealt with in a way of great discretion, as a false

¹ Macbryde, 21st July 1748, M. 657.

² Robertson, 22d Jan. 1835, 13 Sh. 289; Kintore, 20th November 1861, 24 D. 59, affirmed 12th March 1863, 1 Macph. (House of Lords) 11.

³ Stewart, 30th Nov. 1839, 2 D. 167.

⁴ Drew, 8th June 1850, 12 D. 983.

⁵ See the continuation of the case of Drew, 28th February 1852, 14 D. 559, as affirmed 8th March 1855, 2 Macq. 1.

step or inconsiderate expression may do much injury. Where, however, there is only one arbiter, the law, on the subject of his obligation to decide, is quite settled. By acceptance of the reference, he has come under an obligation to dispose of the case, and he is not entitled to renounce his office, or decline to proceed, without sufficient grounds, of the adequacy of which the Court must judge. In early practice, in Scotland, it was usual to allow of summary diligence, at the instance of the parties, for compelling the arbiter to proceed,—and, with that view, he was made to subscribe the submission, which contained a consent on his part to such diligence. A form of the deed, as so framed, will be found in Carruthers' Styles. This form has long been in disuse. But the obligation of a sole arbiter, at Common Law, remains unaltered; and that obligation may be enforced at the suit of either party. This is fully established by the case of Marshall.¹ That case, however, illustrates the practical difficulties attending this point. The Lord President M'Neill, after stating the law on the subject, says, 'How our decret could be enforced against a recalcitrating arbiter, I don't say; there is no such question here, as the arbiter says he is willing to go on, if that shall be held to be his duty.'

ARBITER BOUND
TO DECIDE.

We have now to consider the decret-arbitral in a submission.

DECRET-
ARBITRAL.

This may be indorsed on the submission, in which case it will narrate the arbiter's acceptance of office, and the proceedings that have taken place, as concisely as possible; but so as clearly to bring out that the parties were heard, witnesses examined on both sides, if the fact be so, and the case fully considered in all respects. The importance of being distinct and explicit on these and other (if there are any other) essential points, is shown by many of the cases before cited. Prorogations also will be narrated, if there are any, and the issuing of notes, if that took place. And it is exceedingly desirable that the arbiters should issue notes, because full opportunity is thereby given of putting them right, if they are wrong as to any facts, and of having the case, in every respect, thoroughly brought before them. But it is not indispensable that notes should be issued.² Where the decret is by the oversman, the fact of the arbiters having differed, and the consequent appointment of the oversman, or the emergence of his powers, as arising from their difference, must be distinctly brought out. And, when the decret-arbitral is separate from the submission, it will, before narrating as above, contain a recital of the submission, so as fully to show what was the subject-matter referred, and the arbiters' powers.

The decret then usually proceeds thus: 'and being well and ripely advised in the whole matter, and having God and a good conscience before our eyes, we do hereby give forth and pronounce our final sentence and decret-arbitral as follows, viz.' Here are introduced the

¹ Marshall, 26th March 1853, 15 D. App. 247; Macallum, 3d June 1825, 603. 4 Sh. 66; affirmed 23d May 1826, 2 Wil.

² Johnston, 10th July 1817, 5 Dow's & Sh. 344.

DECREET-
ARBITRAL.

findings of the arbiters, which are very much like those in the interlocutor of a Judge; the findings being, in general, followed by a decerniture in favour of the one party or the other.

After these findings, and the relative decerniture, if any, there will be a decerniture for implement, under a penalty, if that be allowed by the submission, otherwise not; and the arbiters, or oversman, will sanction registration of the decret-arbitral, and of the prorogations and devolution, if any, for preservation and execution, exactly as in the submission,—beyond which, as already stated, they cannot go.

The deed will conclude with a formal testing-clause, which, in the general case, must be framed in accordance with the statutory solemnities applicable to deeds in general.¹ But, where the arbiter was resident in England, and the submission, though executed in Scotland, contained no provision, directly or inferentially, as to the form in which the decret should be authenticated, it was held, in conformity with the opinions of the majority of the whole Court, not essential that the decret, pronounced by the English arbiter, should be contained in an instrument authenticated according to the Scotch forms; and that the Court could interpose its authority to the decret, which was binding in England, the Court being satisfied that it was authentic, and that it expressed, truly and correctly, the final decision of the arbiter.²

DELIVERY OF
DECRET.

Decreets-arbitral require to be delivered to the parties, or placed on record, or otherwise beyond the control of the arbiters, before the submission expires; because, until they are so, the arbiters have power to alter. But it appears to be equivalent to delivery, if the decret, being duly executed, is, during the currency of the submission, placed in the hands of the clerk, or put in course of being transmitted to him, for the purpose of being delivered to the parties.³ The fact that the decret is in the hands of the clerk may, or may not, be equivalent to delivery to the parties. The object for which it is so placed will regulate its effect on that point.

MAJORITY OF
ARBITERS.

Submissions are sometimes made to more than two arbiters. Indeed, by the Act 1426, cap. 87, they were declared null, unless an odd number was appointed. The Act must have assumed that the majority had power to decide; but it is in desuetude as a rule, and, although there may be three or more arbiters, their decision must be unanimous, if the contrary be not provided.⁴ It will therefore be convenient, if consistent with the views of the parties, to give the majority full powers, in case of difference of opinion arising. When the majority are duly empowered, the decret-arbitral is effectual, though two of five arbiters have resigned, and the remaining three only have subscribed.⁵ Likewise, when power

¹ Short, 3d July 1711, M. 16,867; Percy, 25th Nov. 1808, F. C.

² Earl of Hopetoun, 6th March 1856, 18 D. 739.

³ Earl of Hopetoun's case, and M'Quaker, 19th March 1859, 21 D. 794.

⁴ More, 10th Feb. 1693, M. 14,720.

⁵ Love, 1st June 1825, 4 Sh. 53.

is given to three arbiters, or any two of them, when a difference arises, and two only subscribe.¹

When a final decret-arbitral, embracing the whole matter of the reference, has been delivered, the arbiters or oversman are *functi*. They were appointed only for a special purpose, which has been accomplished. And their decret-arbitral must be left to speak for itself. It is the only legal evidence of their meaning. It is therefore of great importance that it be clearly expressed; for even the arbiters themselves cannot be examined, in order to obtain explanations of points of ambiguity in their decret.² Nor, in general, can any separate document be referred to for elucidation. But when the award, in a judicial reference, referred to the arbiter's notes, these were read as part of it.³ The Court of Session had decided that the notes could not be so read;⁴ but, in affirming their judgment generally, the House of Lords expressed a difference of opinion on this point.

AMBIGUITY IN
DECRET.

Where the parties to the submission consent to registration of the decret-arbitral for summary diligence, the submission and decret may, in general, and certainly in all cases where execution is sought by either party, be placed on record; and in virtue of an extract, or office-copy, the party in whose favour the decret is pronounced may give the other party a charge, as in the case of a registered bond or instrument of protest on a bill or note. The consent may be either in the submission, or in a separate writing.⁵ But the extract of the decret-arbitral is not a warrant for diligence, unless the writing containing the parties' consent to registration for execution is also produced.⁶ And, if the submission and decret-arbitral shall happen to involve questions of private character and feeling, and have been delivered to the party assoilzied, it has been held that the other party cannot insist on these being recorded, unless he has a patrimonial interest, or can otherwise qualify a substantial interest to have them so recorded.⁷ When no consent to the registration of the decret is contained in the submission, or in a relative separate writing, diligence cannot follow upon the decret.⁸ In these circumstances, the only course is to proceed by an ordinary action for implement.

REGISTRATION.

We have already seen, when considering the procedure under a submission, various grounds on which the decret-arbitral can be impeached, these being, generally, that the arbiters have exceeded their jurisdiction, or have not, by their decret, exhausted all that was submitted to them, or have been guilty of some misconduct. It is hardly necessary to observe, that a decret-arbitral is open to reduction, if obtained by the fraud of one of the parties. A decret was reduced on that ground in

¹ Macallum's case, already cited, 3d June 1825, 4 Sh. 66; affirmed 23d May 1826, 2 Wil. & Sh. 344.

² Woddrop, 4th Feb. 1794, M. 628.

³ Mackenzie, 9th March 1843, 2 Bell's App. 43.

⁴ Same case, 19th Dec. 1840, 3 D. 318.

⁵ Baillie, 19th May 1829, 7 Sh. 619.

⁶ Muirhead, 19th Feb. 1848, 10 D. 748.

⁷ Dickson, 1st Dec. 1830, 9 Sh. 100.

⁸ Knox, 12th March 1707, M. 625.

the case of Logan.¹ Again, where one of the parties to a reference had written the letter of reference, and, being intrusted with the insertion of the name of the referee chosen by the other party, failed to do so as directed, and inserted the name of a different individual, the award was reduced, and the whole proceedings were annulled.² A complaint of excess in the amount awarded by the arbiter is, however, no ground of reduction of the decret.³ Nor can a decret be opened up by the discovery of new matter, although the production thereof, in time, might have prevented the decision.⁴

PRETENDED
SUBMISSION.

A submission and decret-arbitral, if not *bond fide* intended to settle a dispute or difference, but merely as a cover to a previous agreement between the parties, will derive no spécial effect or value from their form when their true character and object are exposed. Of this we have an example in the case of Maule, as reversed in the House of Lords.⁵ In various lawsuits depending between the parties who entered into the so-called submission in this case, judgments favourable, in part, to each, were pronounced by the Court of Session, and an appeal to the House of Lords had been entered. Thereupon an arrangement was made, which was carried into effect in the form of a submission to arbiters, and decret-arbitral by them, by which the judgments of the Court of Session were in part confirmed, and in part superseded. The object of this proceeding, apparently, was to make an arrangement more binding on heirs of entail interested, and particularly, on the infant son of one of the parties, than a professed agreement would have been. Whether a genuine submission and decret-arbitral would have been good or not, we are not here considering. There was truly nothing of that character. And the House of Lords found 'that the submission and decret-arbitral ought not to be considered as being, or having in law, the effect of a submission or decret-arbitral; but as a form adopted, in which an agreement previously made betwixt the parties to the submission was concluded.'

CHAPTER III.

CONTRACT OF
COPARTNERY.

I NOW pass to the Contract of Copartnery.

Such contracts are entered into when two or more individuals agree to contribute their services, or means, or both, to the carrying on of any particular profession or business. The leading objects of the contract are,—to define the nature of the business, and declare the contribution of

¹ Logan, 15th Nov. 1798, M. App. voce Arbitration, No. 6.

² Deas, 25th May 1821, 1 Sh. 29.

³ Glasgow, Barrhead, and Neilston Railway Co., 23d Dec. 1848, 11 D. 327.

⁴ Sharpe, 17th May 1813, 1 Dow's App. 223.

⁵ Maule, 10th May 1816, 4 Dow's App. 363.

capital or stock to be made by the partners respectively, during the subsistence of the contract; to regulate the conduct of the business, the relative duties of the partners respectively, and their rights and liabilities, *inter se*, in profit and loss; and, when the copartnery comes to an end, to point out the mode in which the business is to be wound up.

Such contracts confer on the partners very extensive powers over each others' fortunes and happiness, and consequently imply exuberant mutual trust and confidence; and they occasion the closest and most confidential intercourse, implying essentially the highest *delectus personarum*.

In constituting a copartnery or company, there must be at least two parties to the contract. One individual cannot, in whatever name or names he may carry on a business, or separate businesses, make a partnership, or create separate interests on the part of ordinary creditors.¹ Neither can the same individuals make two separate copartnerships, at least in questions with third parties. If the partners, carrying on two separate businesses, are the same, they will be dealt with as making only one partnership. This was fully brought out in the case of Williams,² where two apparently separate concerns, trading under different firms,—the one, Inglis Borthwick Gilchrist and Co., as bankers; the other, James Inglis and Co., as linen-draper, —were dealt with as one and the same company: a case which brings out the distinction, often overlooked in deeds and documents, between a firm and a company. There were two firms,—Inglis Borthwick Gilchrist and Co., and James Inglis and Co.,—but only one company. The same rule of law was applied in even a stronger case, viz., where the partners carried on the trade of bankers under one firm, and the trade of fishcurers under another. They stopped payment; and, had there been separate concerns, the bankers would have paid nearly in full, the fishcurers almost nothing. But, under the advice of counsel, the case was not even tried. The parties were held to form only one company, and the creditors of either concern were dealt with as creditors alike of both.

DISTINCTION
BETWEEN
'FIRM' AND
'COMPANY.'

Companies may be divided into numerous classes with reference to the objects for which they are formed or carried on; but these objects may not very materially affect the nature or form of the contract of copartnery, or deed or act of constitution or incorporation. In a Conveyancing point of view, it will be convenient and sufficient to consider them as divided into private companies, being those which have a small, and in most cases limited, number of partners, and are not registered; and public or joint-stock companies, being those in which a number of persons, usually considerable, associate themselves in partnership for business purposes, and which companies now require to be registered. There is, in principle, much similarity between the modes of constituting companies of these two classes respectively; but the forms are widely different, and the legal rules, on several points applicable in each case, require to be separately noticed.

¹ Nairn, 25th Nov. 1795, Bell's Com. ii. 625, Note 1. ² Williams, 13th June 1809, F.C.

PRIVATE
COMPANIES.

We take first the private company, and consider the formal contract of copartnery appropriate to such a company.

PARTNERS.

There must, as we have seen, be two partners at least. Until the commencement of the 'Companies Act, 1862,'¹ on 2d November 1862, there was no limit by law as regarded the number of the individuals who might form themselves into a private copartnery; but that point has been the subject of regulation by several public Acts, and is now regulated by the Companies Act, 1862, to the extent and in the manner which we shall presently see. Though, however, the number of partners in a private company was not subject to any regulation by law until a comparatively recent date, it was not usual to find more than four or five members in such companies. They are named and designed in the introductory or narrative clause of the contract. Because of the *delectus personarum* implied in the contract, no additional partner can be introduced, as by the subdivision of a partner's interest; nor can one partner substitute another in his room without either express power to do so in the contract, or the consent of all the other partners. Neither will the representatives of a partner dying during the subsistence of the copartnery come into his place, unless it is so provided in the contract, or with consent as above. A contract, however, may be so framed as to make the heirs of the parties partners, as representing their predecessors; and to give the heirs no option on that point.² Moreover, the contract may contain power to any one or more of the partners to assume an additional partner, or to substitute another in his own room, in case he is allowed to withdraw.

DESCRIPTION
OF BUSINESS.

The first point expressed by the contract, after the clause in which the partners are named and designed, is the description of the business to be carried on; as, for example, cotton-spinners, booksellers, type-founders, or the like. The description should be sufficiently comprehensive to embrace all that falls properly within the *bond fide* scope of the intended business, and at the same time free of vagueness or uncertainty. The description, if clear and accurate, and if the company has not been trading beyond its limits, will at once afford a *test, inter socios*, by which to say whether any partner has been attempting to bind the company improperly, and beyond the limits of its own business. In questions between a private company and third parties, however, though clearness and accuracy of description must always be desirable to prevent the contract from being improperly quoted against the company, the terms of that deed cannot be founded on as settling whether an obligation granted by a partner is not connected with the business carried on by the company. Third parties judge as to the nature of such business, not by the contract, which is a private document, but by facts and circumstances; and with them the question, whether the obligation

¹ 25 & 26 Vict. c. 89.

affirmed, 24th February 1815, 3 Dow's

² Warner, 24th Jan. 1798, M. 14,603; App. 76.

was, or was not, in the line of the company's business, appears to be one of fact for the determination of a jury.

The next point is to specify the place or places where the business is to be conducted ; as to which no remark appears necessary.

Then follows the specification of the firm, or descriptive name of the copartnery ; as, for example, Ramsay Bonar and Co. ; The Summerlee Iron Company ; or the like. In general, a company can assume any suitable descriptive name under which to carry on business. But the rule to that effect is not absolute. In the Companies Act, 1862, sect. 20 (in accordance with the provisions of the Joint-Stock Companies Act of 1856, sect. 6), it is provided, as a general rule, subject to an exception which need not here be noticed, that no company shall be registered under a name identical with that by which a subsisting company is already registered, or so nearly resembling the same as to be calculated to deceive. A similar restriction, I apprehend, is capable of enforcement in reference to private companies at Common Law.

It sometimes happens, also, that the right to use the firm of an old established company virtually carries the goodwill of the business of such company with it. And there are circumstances in which it would seem that such firm could not be adopted even by one of the partners of the old company.¹ In the case of *Marshall*, a company composed of two partners was about to be dissolved, and it so happened that the name of the firm, under which it had been carried on, suited with exact accuracy the circumstances of a new company in the same line of business, formed by one of the partners of the old company and his two sons. The other partner, however, was also to carry on the old company's business, and it would have been a great hardship on him that his late copartner should have been allowed to adopt and appropriate the firm under which they two had carried on their trade. From the report of the case, it does not appear that the question of the legal right of one of the two partners to adopt the name of the old firm was settled, or indeed regularly discussed ; but, in point of fact, the old firm was dropped, and, in the case to be immediately noticed, Lord Balgray says, ' In the case of *Marshall*, it was found that no partner of a new establishment had a right to assume the old firm.' Probably, therefore, opinions to that effect had been expressed on the Bench, though not reported.

The point was afterwards tried in the case of *The Edinburgh Correspondent newspaper*,² where parties who had carried on a newspaper, under the above name, were found entitled to prevent another paper being published under the same name, or under such title or appearance as might mislead the public regarding the identity of the new and old papers. This was held an infringement of their rights, on the principle

¹ See *Marshall*, 26th January 1815, F. C.

² *Edinburgh Correspondent newspaper*, 28th May 1822, 1 Sh. 497, 2d edition.

that the goodwill of the publication was in a great measure in its firm or descriptive name; and that the goodwill acquired by an established paper was a valuable property, of which no one was entitled to deprive another. The same point is brought out in the case of *M'Cormick*,¹ where it was found that the executors of one of three joint-proprietors of a current newspaper had an interest in the future publications, which they were entitled to sell by public roup, the other proprietors having refused to purchase.

As to this point,—the right to use the firm,—I think there are cases in which a provision should be inserted in a contract of copartnery, giving one or more particular partners the right to use an old firm, in case of a dissolution; for example, where two or more partners, carrying on business under an established firm, assume a junior partner. The firm, in case of dissolution, by the junior going out, should naturally belong to the old partners, or the survivor of them. And there are other cases again in which such use should not be allowed; and it may be thought advisable to fortify the rule of law by an express provision on the subject. The point is one which may require consideration and adjustment, according to circumstances.

ENDURANCE
AND DISSOLU-
TION OF
CONTRACT.

The next point is the endurance of the contract.

It is not essential to the contract that any particular term of endurance of the copartnery shall be specified in it. Where nothing specific is said on that point, the rule of law is, that the copartnery may be dissolved (except to the effect of winding up) by any one of the partners who wishes to withdraw; but if he takes any undue advantage, or occasions loss or damage by the manner of his so doing, he will be liable for the consequences.² This rule is founded on the *delectus personarum* implied in such contracts. Moreover, the death of one of the partners will, *ipso facto*, operate dissolution, if the contrary be not provided for. The insolvency of a partner, however, does not of itself operate dissolution; and an insolvent partner, though unable to contribute towards losses, has been found entitled to continue participation in the profits.³ Neither does bankruptcy, of itself, operate dissolution, though it is a ground on which dissolution may reasonably be required.⁴

To prevent the inconvenience and loss arising from sudden dissolution, the contract usually binds the partners to carry on the business for a particular term or number of years, from and after a day or date specified.

The contract may be for a long or short period, as the nature of the business or other circumstances shall require. Partners, for example, in a trade where heavy outlay is involved at the commencement, and, the profits are to be drawn in a series of future years only, will make the term of their contract such as to give them the fair benefit arising

¹ *M'Cormick*, 4th July 1822, 1 Sh. 541.

² *Erskine*, iii. 3. 26, note 126; and *Marshall's case*, before cited.

³ *Paterson*, 12th July 1749, M. 14,578.

⁴ *Erskine*, iii. 3. 26, note 129.

from their outlay; where, on the other hand, the business is of a character not involving much outlay, there is not the same occasion for lengthened contract. A few years make so great changes, by death and otherwise, that it will often be found inconvenient to have exactly the same arrangements continued for a long term. The contract should, therefore, by its expiry, give opportunity and occasion for necessary modifications. It may also, frequently, contain power to any one of the partners to withdraw, either absolutely, at his discretion, or in certain contingencies specified; he always giving such preliminary written notice as shall be thought necessary. But the time of endurance, though in the case of a private company it must, if specified, be limited, may legally extend beyond the expected lifetimes even of several generations. Thus a contract for 124 years was sustained, in the case of Warner, already cited; and it was there found, that one of two partners could not withdraw without consent of his copartner, there being no power of withdrawal in the contract. This was the case of a coal and salt work, involving heavy outlay; and the copartnery was constituted by a deed, containing mutual leases, by adjoining proprietors, of the coal in their respective estates, for the above period, to be worked for joint behoof.

The mere fact that a lease, for a term of years unexpired, is held by the company as part of the company property, does not affect the endurance of the contract of copartnery, which can be dissolved, except for winding up, before the termination of the lease.¹ A contract, however, may, under circumstances of a very special nature, be dissolved during its subsistence. In Warner's case, Lord Meadowbank, Ordinary, expressed as his opinion, 'that if it is a losing concern, and 'threatens to involve the pursuer in future loss; or if the defender's 'conduct as manager has been such as to render his fidelity or ability 'for the undertaking justly suspected; it must be competent to the 'pursuer to get free of the concern, by obtaining a dissolution of the 'partnership, and a sale of its property,' etc. etc. And in the case of Barr,² two out of three partners were found entitled to dissolve a copartnership, before expiration of the contract, and against the will of the third partner, on the ground of greater advances than were expected being required to justify the carrying on of the business, and the eventual benefit being doubtful. Courts of Law, however, are reluctant to interfere to control an express agreement deliberately made; and in the case of Bain³ it was held, as to a certain church-building society, that difficulty or improbability of attainment of the end in view would not authorize dissolution, and that nothing short of impossibility would do so.

The contract of copartnery next declares the amount of capital stock

CAPITAL STOCK
OF THE COM-
PANY.

¹ Marshall's case, and sequel thereto, 23d Feb. 1816, F. C.

² Barr, 18th May 1802, cited in Bell's Comm. ii. 633, note 2.

³ Bain, decided in the Court of Session, 17th November 1846, not reported; affirmed 22d February 1849, 6 Bell's App. 317.

of the company, and the proportions in which the partners shall be bound to contribute the same ; and declares that the amount contributed by each shall remain in the hands of the company during the copartnership ; the partners being stated as creditors of the company for their shares of stock, and entitled to receive interest thereon annually, at a specified rate, from the date of the advance during the not payment. It may sometimes provide that what more is found necessary shall be contributed by the partners in the same proportions ; but, except for clearing off liabilities incurred by the company, no such contribution can be called for. If the contract is silent, and there are no circumstances affording evidence as to the amount of the partners' contributions, the law will hold their shares and liabilities to be equal.

MODE OF
CONDUCTING
COMPANY'S
BUSINESS.

The next provision, or rather set of provisions, has in view, generally, the mode of conducting the business of the company, and the powers and duties of each of the partners for that purpose.

We are here exemplifying the provisions of an ordinary mercantile company's contract. There are many private contracts much more elaborate, and there are also many more which consist of little else than jottings,—or, it may be, heads of agreement.

The clauses applicable to the management will vary much, according to circumstances. They will, in general, give each partner power to sign the company firm ; but only on the proper business of the copartnership. In questions with third parties, however, each partner has such power by law ; and he has that power, even though prohibited by the contract, the stipulations of which are generally binding only *inter socios*.

The clause in question ought likewise, in all cases, to make provision for the due and orderly management of the business,—the charge of cash and vouchers,—keeping all necessary books,—and balancing the books at regular and stated intervals.

Along with the power to sign the company firm, in connexion with the company business, there will, in general, be a declaration, that if such power be abused, or the funds of the company applied by any partner otherwise than for value received by the company, and entered in their books, the irregularity shall, in the option of the other partners, be held a contravention of the contract, and sufficient ground for compelling the offending party to withdraw from the concern. The same clause will bind the offender to relieve the company of all loss consequent on his breach of the contract, and may stipulate for a *solatium*, on account of injury or damages occasioned by the malversation.

DECLARATION
THAT PARTNERS
SHALL ENTER
INTO NO OTHER
BUSINESS.

At the close of the provisions regarding the management, there usually is a declaration that the partners shall, during the subsistence of the contract, enter into no other business, but give their whole time, and direct their best endeavours to the promotion of the company business ; and here also contravention may be declared a ground on which to oblige the contravener to withdraw. The law itself, however, forbids a partner to employ the funds or credit of the company in a separate ad-

venture for his own behoof. If a partner does so, the company is entitled to the profit.¹ And in general it is presumed, that a partner, acquiring a right connected with the company's business, makes the acquisition on behalf of the company; the law insisting that no one partner shall acquire profit in the line of the company's business, without his co-partners participating, or shall even place himself under circumstances of temptation to do so.²

Following after the clauses applicable to the management of the business, there will sometimes be a provision for payment of fixed salaries or allowances to the partners, or some of them. The stipulation for a salary is required, specially, where a partner, valuable as a manager, or in some particular department, has comparatively a small share of the profits; and when his salary will form a considerable portion of his income from the business.

The contract will then declare the rights of the partners in the profits, and their liabilities *inter se*, for the losses of the concern; and very often will declare that the partners, respectively, shall draw no more than certain specified sums yearly from the concern, in respect of salary and profits together; the balance or surplus, if any, going to their credit in personal account with the company; to be paid or accounted for, with interest, at the dissolution of the company. This clause has a wholesome object; viz., to strengthen the business, by increasing the amount of the working or available capital, and to keep down the personal expenditure of the partners respectively.

RIGHTS AND
LIABILITIES OF
PARTNERS.

When the contract does not lay down rules for the division of profit and loss, the legal presumption is, that they are to be divided according to the amount of the stock put in by each partner respectively. But, on cause shown, a partner will be found entitled to a larger proportion than corresponds to his share of the stock.³ When neither the proportions of the stock nor the division of the profits are provided for, Erskine says⁴ that both are presumed to be equal, unless the contrary be proved to have been agreed on. An extra allowance will not be made to one of the partners, merely on the ground that he did the greater part of the work.⁵ From the report of M'Whirter's case, it does not appear that there was any input stock in that case; and, there being no stipulation to the contrary, the Court held the shares to be equal. The same rule was applied in the case of a joint adventure; and it was said that, in such transactions, equality of interest was presumed when the contrary was not proved.⁶ But, in a case where there was a partnership without any contract at all, the House of Lords, reversing the judgment of the Court of Session, found that there was no presumption of law in favour of

¹ Wallace, Hamilton, & Co., 8th June 1821, 1 Sh. 54; affirmed 23d June 1824, 2 Sh. App. 467.

² Menzies, p. 425.

³ Struthers, 19th May 1826; 2 Wil. & Sh. App. 153.

⁴ Erskine, iii. 3, 19.

⁵ See M'Whirter, 14th Feb. 1822, 1 Sh. 319.

⁶ Fergusson, 3d June 1836, 14 Sh. 871.

equality of interest between the partners ; and that the extent of a deceased partner's share was a question of fact to be ascertained by a jury.¹

In general, a partner's share of loss will correspond with his share of profits. But the contrary may not only be provided expressly, but may be inferred from circumstances, and the conduct of the parties. A case of this nature occurred,² where the manager of a company had, by the contract of copartnery, a salary, and likewise a share of the profits, according to a proportion of capital stock, not advanced by him, but set down in his name by way of nominal interest, for the purpose of making an addition to his salary ; depending, however, upon the success resulting from his skill and industry. The contract declared the partners (including this manager) interested in the profits and loss in certain specified proportions. But in the whole circumstances of the case (which is very special) it was considered that the provision as to division of profit and loss was not intended to apply to the case of the manager.

In general, a party, who in reality is to be only the manager, ought not to be even nominally a partner. The agreement with him should not be made by the contract of copartnery, but by a separate probative document stating his salary ; which, if so arranged, may be more or less dependent on the results of the business,—he being always declared not liable for losses in any event.

PROVISION FOR
SETTLEMENT
WITH REPRESENTATIVES OF
DECEASED
PARTNER.

The contract will next make provision for settlement with the representatives of any partner dying during the subsistence of the copartnery ; and if, as is very common, a partner, on becoming bankrupt or insolvent, is to be bound to withdraw from the concern, provision will be made for settlement with his trustee or creditors. The usual arrangement is, to declare the interest of the party dying, or becoming bankrupt or insolvent, to be fixed by the balance-sheet made up as at the time for balancing last before his death, bankruptcy, or insolvency ; and to pay the amount there brought to his credit, to those in his right, at such intervals and by such instalments as the means of the concern will reasonably allow. For these instalments it is usual for the company to grant their bills, and the contract should provide for such bills being accepted without security. The surviving or solvent partners will, however, further become bound to relieve those in right of the deceased, or bankrupt or insolvent partners, of all the obligations of the concern ; and to report discharges thereof within a specified period. On the other hand, the contract will declare that, upon the death, or bankruptcy, or insolvency of a partner, his share in the company-property shall fall to the surviving or solvent partners, rateably according to their own then existing shares in the concern.

If the contract provides that a partner's representatives are to be

¹ Campbell's Trustees, 26th May 1829, 7 Sh. 650 ; reversed, 14th Feb. 1831, 5 Wil. & Sh. 16 ; see also the Aberdeen

Town and County Bank, 29th Nov. 1859, 22 D. 44.

² Geddes, 24th July 1820, 2 Bligh's App. 270.

paid out, according to the last balance made before his death, and the company have been in use to balance annually on any particular day, the surviving partners are not entitled to injure the interests of a deceased partner by delaying the actual balance, even although the contract does not expressly name the time for the balancing. In a case where an annual balance was provided for, and the balance was usually struck in May, a partner, foreseeing his own death as probable, repeatedly required the manager, after the usual time for balance came, and latterly in the form of notarial protest, to strike the balance of the bygone year. The partner survived till July, previously to which the balance had not been struck; but the House of Lords, affirming the judgment of the Court of Session, held the surviving partners liable to account according to the balance which ought to have been struck in the month of May before their copartner's death; not the last balance actually struck, and which was in the month of May of the preceding year.¹ On the other hand, when, between the date of the last balance and the death of a partner, the concern became hopelessly insolvent, and was ultimately obliged to wind up, the representatives of the deceased partner were found not entitled to claim upon the balance-sheet struck before his death, although the contract expressly allowed such claim.²

It is not unusual to introduce in contracts power to the partners to make alterations on the original agreement, by minutes or otherwise indorsed on the contract, or engrossed in the company's books. But the partners, when they all concur, have such power, without special provision in the contract, and it is open to them to adopt what form they think fit, whether it corresponds with the express clause in the contract or not. The terms of the alteration ought to be clear and distinct; and it will be convenient that the form be agreeable to what is pointed out by the contract, or at least probative.

The contract next provides as to the mode of winding up the company's affairs upon the termination of the copartnery; and here different sets of provisions will be found necessary, in the case of companies of different characters. The general object is to realize the estate and debts due to the company, to clear off all their liabilities, and to divide the surplus among the partners, or allocate on, and recover from them, the loss, according to their interests, all as speedily as is consistent with good and fair administration.

It is not uncommon to appoint some professional man, in whom the parties have confidence, arbiter, with the necessary powers; and when the partners,—in a minute of dissolution of their copartnery, and expressly with the view of winding up the whole affairs of the company, and dividing the assets among the partners and their heirs,—named an accountant referee and arbiter between them, with power to call for the books, vouchers, etc., it was held that the purpose of the reference, and qualifi-

¹ Forster, 30th May 1800 (not reported);
affd. 26th Feb. 1802, 4 Paton's Cases, 295.

² Blair, 15th Feb. 1776, M. 14,577,
(affirmed 30th April 1777).

POWER TO
ALTER ORIGINAL
AGREEMENT.

PROVISION AS
TO WINDING-UP
THE COMPANY'S
AFFAIRS.

WINDING UP A
PRIVATE COM-
PANY.

cations of the referee, showed that this was not an ordinary submission, but a contract to have the balance ascertained by a referee of skill, which did not fall by the death of one of the partners. The arbiter's award, pronounced after the death of one of the partners, was therefore held good.¹ The legal result would, no doubt, be the same, if the clause appointing the professional arbiter for the like purposes were inserted in the contract of copartnery.

When the contract is silent, or contains no adequate provision, on the subject of the mode of winding up, or when there is no special contract, so that the rights of parties are left to the operation of the law, a great variety of cases may have to be provided for, though here we can look only to those of a leading or comprehensive character. As a general rule, company property, incapable of division among the partners, and as to the disposal of which the parties cannot agree, must be sold by public auction. It was so found as to the lease of a shop in Edinburgh, after ascertaining, by the report of tradesmen, that the premises were not capable of being actually divided between the copartners.²

OUTSTANDING
DEBTS.

In cases where the partners of the dissolved company are to carry on the same business separately, and where the outstanding debts due by the company are inconsiderable, it may, in general, be advisable to divide or allot among the partners, according to their interests, such of the stock in trade as is suitable to their business, and to allow only what remains to be sold. The debts due to the company in such cases may be classified as—(1.) good debts; (2.) debts of doubtful value, and set down as worth so much per £1; and (3.) debts bad, or of uncertain value. The good debts should be allotted to the partners according to their share or interests in the company's assets, each taking the collection and risk of those which fall to him, so that there may be no question of due diligence in recovery, or after-accounting, regarding such debts. The doubtful debts may be allotted in like manner, or along with the bad debts handed over to some third party, to be realized as far as possible, and the proceeds, as they come in, to be divided among the partners according to their interests. Even in such cases, however, if there are considerable debts outstanding against the company, the simplest and most secure way of providing for their payment will be to hand over a sufficient amount of good assets to some third party, mutually agreed on, to be realized. He will be ordered to pay the debts out of the proceeds, and to divide the surplus among the partners according to their interests. But if the partners are not to carry on the old business, or where they are to carry on such business, but do not agree to the allocation of assets and debts, as before suggested, they ought to employ some third party to realize the whole estate of the company, pay the company's debts, and divide the free surplus among them according to their interests. If they cannot agree as to the person to be so employed, their course apparently is to apply to the Court of Session to name a judicial factor for these purposes.

¹ Orrell, 22d Feb. 1859, 21 D. 554.

² Marshall, 23d Feb. 1816, F. C.

Lastly, the contract will, in general, contain a clause referring all disputes or differences that may arise, relative to the meaning or execution of the deed, or the rights and interests of the partners, or their representatives, to an arbiter, or to arbiters in succession, with the powers and declarations usual in cases of submission. But, as before explained, a submission of disputes or differences, to arise under any ordinary contract of copartnery,—to an arbiter to be named, or to a party merely described as holding a particular office for the time,—is not binding, and will not even oblige the parties to name an arbiter, or enter into a reference at all. An attempt by a partner to terminate the copartnery, by taking wrongous proceedings with a view to procuring sequestration, is not a difference in the sense of the above clause, and raises a point for settlement by the Court, not for the arbiter, even though he is named.¹

CLAUSE OF
REFERENCE.

The contract will conclude with consent to registration and testing-clause; the consent being made applicable not only to the contract, but also to any alterations thereon, and to any decret-arbitral to be pronounced in the submission. The consent will be with a view to decret and diligence on six days' charge; and the deed will be completed with all the usual solemnities of an ordinary deed.

CLAUSE OF
REGISTRATION.

But the contract, though informal, may be validated by *rei interventus*.² Indeed, a partnership can be constituted without any written contract at all. In the case of Livingston,³ three individuals had entered into a copartnery, under a contract which was cancelled on the occasion of one of them withdrawing from the concern. The other two carried on the same business for two years, continuing the old books. They insured their premises as in name of a company; they sued, and were sued, as a company; and letters were addressed to them as such. They applied for sequestration in the character of a company; and the Court, in a competition between certain creditors, claiming as against the company, and other creditors claiming as if there had been no company, but only two individuals engaged in a joint adventure, preferred the former, being those who claimed as company-creditors.

INFORMAL
CONTRACTS.

When a written contract is founded on, parole testimony is not a competent mode of proving its terms; and a proving of the tenor will only be allowed on sufficient evidence that the written document is lost or inaccessible.⁴

And here I may observe, that by the constitution of a copartnery a separate *persona* is created, which subsists till the affairs are actually wound up, notwithstanding the dissolution of the company as a trading or going concern. It will even subsist to the effect of winding up, notwithstanding the death of all the partners.⁵ And when all the partners are dead, and it can be shown, after the dissolution of the company as a

COMPANY
SUBSISTS FOR
WINDING UP.

¹ Lauder, 9th March 1852, 14 D. 633.

² Livingston, 17th Jan. 1755, M. 14,551.

³ Hay, 3d July 1800, Bell's Comm. ii. 646, note 3.

⁴ Aberdeen Town and County Bank, 30th Nov. 1860, 33 Jurist, 44.

⁵ Bell's Comm. ii. 637.

going concern, that there is great risk of confusion and loss for want of an administrator, the Court will interpose, by the appointment of a judicial factor, to wind up the estate.¹

**FEUDAL
PROPERTY.**

A mercantile company, unincorporated, is not capable of holding feudal property. This results from the principles of the feudal law, which, as a general rule, requires one or more individuals as vassals in lands held by feudal tenures; and, when feudal property is acquired for a company, it is usual to establish the title thereto in the persons of the partners individually, and the survivors and survivor of them, in trust for behoof of the company.

LEASES.

Leasehold property acquired by a company can, however, be held by the company *socio nomine* though unincorporated.²

**PARTNERS'
SHARE MOVE-
ABLE.**

But even where the property of the company consists of land, or leases, or other estate which *ex sua natura* is heritable, the right and interest of the partners is moveable or personal estate, and upon their death falls to their executors, not to their heirs.³ This appears to follow from the lands, etc., being the property of the company as such, and not of the partners as individuals; and because at Common Law, and apart from special arrangement to the contrary, such lands, etc., are not divisible among the partners on the dissolution of the company, but are then to be realized, so that the proceeds may be paid over to the partners rateably, according to their interests.

A partner's interest in the company property, moreover, is attachable by arrestment,—the mode of attachment applicable to moveable property held by one party for behoof of another. The arrestment will be laid in the hands of the company as the holders of the fund.⁴ But, if the partner himself could not have withdrawn the fund from the concern during the subsistence of the copartnership, his arresting creditor will in like manner be restrained. Moveable effects belonging to and in the possession of the company can be poinded for company debts; poinding being the proper diligence for attaching such moveable property in the hands of the owner; but the share of any partner, in effects belonging to and in possession of the company, is a joint and not a separate interest in such effects, and cannot be poinded for such partner's individual debts.⁵

We have hitherto been considering the operation of the contract of copartnership as in questions with the partners themselves, or those in their right. As regards third parties, the regulations of the contract are of comparatively little importance, at least they cannot be founded on with much effect by the company in their own favour.

**LIABILITY OF
PARTNERS FOR
COMPANY-
DEBTS.**

It may be laid down, in the first place, as an absolute rule, that, whatever the contract may say on the subject, the company and all the partners are liable, jointly and severally, for the whole debts and obliga-

¹ Dixon, 22d Dec. 1831, 10 Sh. 178; affirmed, 13th Aug. 1832, 6 Wil. & Sh. 229.

² Dennistoun, 16th Feb. 1808, M. App. voce Tack, No. 15.

³ Minto, 23d May 1833, 11 Sh. 632; Irvine, 15th July 1851, 13 D. 1367.

⁴ Neilson, 19th Nov. 1742, M. 716.

⁵ Fleming, 2d Dec. 1828, 7 Sh. 92.

tions undertaken by the company; likewise for all debts and obligations undertaken in the proper line of business of the company, by any one partner, by his signing the name or firm of the company. The law holds that, to the above extent, every partner is specially authorized by his copartners to bind the company.¹ This rule holds even against individuals who were dormant partners; and in favour of creditors who were not so much as aware of such individuals being partners.² And a partner, who retired from the company by agreement, reserving a share of the profits, was held to be still (as regarded third parties) a partner, and liable as such.³ The rule further operates to subject those who were at one time partners, in liability for debts contracted after they had retired, and had ceased to be interested in the profits of the company, in questions with parties to whom the fact of their retirement had not been duly made known.⁴

A party, in order to his liberation from the debts contracted after his retirement, ought to give the utmost possible publicity to the fact of his having ceased to be a partner. This is usually done by the insertion of a notice of retirement in the *Gazette*, and in one or more ordinary newspapers circulating in the places where the company carried on their business; and also by letters addressed to the parties with whom the company were in use to deal. Notice by letter is sufficient, if the notice is traced to the hands of the party claiming as creditor; or, in the case of an assignee, to the hands of the cedent prior to the date of the assignation.⁵ But it is not sufficient if the notice is not brought home to the creditor.⁶ Notice is necessary even in the case of a dormant partner on his retirement.⁷ But when the dissolution is occasioned by death,—the decease being a public fact,—parties are bound to know it; and the representatives of the party deceased are not liable for debts contracted after his death.⁸ Private knowledge of the retirement of a partner is also sufficient to operate such partner's relief from subsequent obligation to the person or persons possessed of such knowledge.⁹ It is also equivalent to notice, if, after the retirement of a partner, the firm or company name is obviously and distinctly changed. In that case there is no room for presuming that the partners are the same as under the old firm.¹⁰ But in the case of a private company, notice, or death, or private knowledge, or a new firm, will operate relief only from future debts. In the case of a public company, under the Companies Act 1862, the rule on this point is different as regards persons ceasing to be members of such companies, and is more favourable to such persons, as we shall presently see. But in the case of a private company, the partner retiring, or his representatives, will remain liable as before for all the debts and engagements of

NOTICE OF
RETIREMENT.

¹ Dewar, 14th June 1766, M. 14,569; British Linen Co., 14th Jan. 1853, 15 D. 277.

² Watson, 17th Dec. 1806, Hume, 756; Hay, 27th Jan. 1809, F. C.

³ Boulton & Others, 18th April 1787, 3 Paton's App. 70.

⁴ Dalgleish, 24th May 1791, Hume, 746.

⁵ Bertram, 13th Feb. 1822, 1 Sh. 314.

⁶ Sawers, 24th Feb. 1815, F. C.

⁷ Hay's case, already cited.

⁸ Christie, 17th May 1839, 1 D. 745; Erakine, iii. 3. 26, note 128.

⁹ Aytoun, 19th July 1844, 6 D. 1409.

¹⁰ Dunbar, 10th March 1810, F. C.

the company, up to the time of retirement or death, until these are actually paid, or, in regard to him, discharged.¹

Company-debts, when claimed from a partner or his representatives, require to be duly constituted against the company. When they are so, as, for example, by the company's bond or bill, the representative of any partner can be sued for payment without calling the company.² But the debt, if not so constituted, must, in the first place, be duly constituted against the company.

PARTNER'S
SIGNATURE.

It is, however, only for debts in the ordinary and proper course of the company's business that one partner can bind the company by signing the company name. Thus, where the managing partner of a company subscribed with the company name a guarantee for behoof of a relative of his own,—for the price of goods of a class in which the company did not deal,—the party furnishing such goods was found not entitled to presume that they were to be applied for behoof of the company, and was not *in bond fide* to assume that the guarantee was binding on the other partners.³ Neither can an individual partner effectually bind the company, by merely signing the name of the firm, for payment of his private debt.⁴ And individual partners cannot of themselves perform acts of extraordinary administration so as to bind the company, because it is not to be presumed that power to do such acts is conferred on each of the partners. Thus, as already stated, a partner cannot bind the company to submit a claim to arbitration, that being an extraordinary act.⁵ In England, it is settled that a power of attorney cannot be granted by a company without the consent of all the partners; and, on principle, it appears probable that the same rule would be held applicable in Scotland; because a power of attorney on behalf of a company is a delegation to another, of the company's powers in the matter in question, which is an extraordinary act.

As a general rule, the partners of a company will be liable for obligations undertaken by each other for work, which, when executed, is to be company property. But this rule is subject to exceptions. The question for consideration of the Court is, whether the contract, made by the individual partner, is entered into by the other party with him as acting for himself and for his own behoof, and on his own responsibility; or for the company and on its responsibility. In the latter case only is the company liable.⁶

I may here notice a case, which may at first sight appear an exception from the rule of a partner's liability for loss in consequence of having a joint interest in profits.⁷ A party contracted with a company of publishers for the publication of a book, of which he had the copyright; the company being to undertake the whole expense, responsibility, and

¹ Ramsay's Executors, 18th Jan. 1814, F. C.; Ker, 22d Feb. 1845, 7 D. 494.

² M'Tavish, 3d Feb. 1821, F. C.

³ M'Nair & Co., 19th June 1803, Hume, 753.

⁴ Clarke, 30th Nov. 1821, 1 Sh. 179.

⁵ Lumsden, Nov. 1728, M. 14,567.

⁶ Crum & Co., 5th March 1858, 20 D.

751.

⁷ Venables, 8th March 1839, 1 D. 659.

trouble; and he to have a share of the profits, and to bear no loss. The publishers failed, and the person who had sold them the paper for the book claimed payment of his account from the proprietor of the copyright, as interested in the profits, and a partner. But the Court held that he was not a partner; and that, although the price payable for the right of publication was dependent on the amount of the profits, the transaction between him and the publishers was merely a sale of such right of publication by him to the publishers.

An important point may here be also noticed, which was recently settled, viz., that when trust-funds, under the administration of the partner of a company, are employed for the ordinary business purposes of the company, the beneficiaries are entitled, in their option, to take either five per cent. interest thereon, or the profits realized from the use of the money.¹ But, unless all the partners of the company are trustees of the party to whom the funds belonged, the claim of the beneficiaries to profits extends only to the proportion realized by the partner, who is a trustee himself, out of the trust-money,—not to the whole profits arising to the copartnership from such money.²

In case of the bankruptcy of a company, the creditors of the company are entitled to claim and be ranked for drawing dividends on the estates both of the company and of the partners as individuals. In claiming on the company-estate, such creditors are not required to deduct the value of their claim or ranking on the individual partners' estates. But in claiming on the estates of the partners, such creditors must deduct the value of their claim on the company-estate.³ The same rule holds when the creditors of the company claim for the purpose of voting on the estates of the company and the partners thereof,—with this addition, that the claim on the estate of each of the partners as individuals is to be stated, under deduction of the value not only of the creditor's claim upon the estate of the company, but also of his claim upon the estate of each of the other partners of the company.⁴

The explanation of these rules appears to be as follows:—The company and partners are jointly and severally liable, *in solidum*, to the creditor; but, in company-debts, the company is the proper debtor or principal; the partners are cautioners for the company, and each of the partners is cautioner for his copartners. In claiming on the estate of the proper debtor (the company), there is no deduction of the value of the claim upon the cautioners; because the proper debtor is bound to pay in full, irrespective of the cautioners. But the same principle does not apply in claiming upon the estate of the cautioners. Their obligation is only subsidiary. Accordingly, in claiming on the cautioners' estate for a dividend, the value of the claim on the principal debtor's

¹ Cochrane, 1st Feb. 1855, 17 D. 321; Laird, 26th June 1855, 17 D. 984.

² Continuation of case of Laird, 28th May 1858, 20 D. 972.

³ Bankrupt Act of 1856, 19 & 20 Vict. c. 79, s. 66.

⁴ Same Act, s. 61.

TRUST FUNDS.

RANKING OF
CREDITORS.

estate is to be deducted, and the dividend from the cautioners' estates is payable only on the balance ; and, in claiming for voting on the estate of each of the partners, the value of the claim on the estates of the other partners is likewise to be deducted. This appears to arise, in part at least, from the general rule applicable to cautionary obligations, that the cautioner on paying the debt is entitled to be ranked for the amount, and to draw the value from the proper debtor. But that rule does not hold in reference to the liability of the partners of a company, individually, for payment of the proper debts of the company, unless the partners pay the whole debts of the company in full. Except in such case, no partner, though only a cautioner for the company, can claim on the estate of the company.

CHAPTER IV.

PUBLIC OR JOINT-STOCK COMPANIES.

WE shall now consider, as shortly as possible, the constitutions of Public or Joint-Stock Companies ; that is, associations of a numerous body of persons in partnership for carrying on a particular business, such as banking or life insurance ; observing, that these constitutions have, for their object, the same general purposes as those of the contract of copartnery of a private company. They point out who are to be the partners or shareholders, the name of the company, the nature of its business, the place where it is to be carried on, or at least its head-quarters or domicile, the amount of the capital stock, the number of the shares into which it is to be divided, and the manner in which the stock is to be raised or called up.

So far, there is not much difference between the two classes of contracts. The rules, regarding the conduct of the business, differ as to details, in the two cases. In private companies, the management is usually undertaken by the partners ; and the contracts set forth their respective duties on that point. Joint-stock companies generally place their affairs under the charge of a committee of management, chosen from among the partners, and called the directors of the company. These directors, again, appoint managers, secretaries, auditors, or others, who may, or may not, be shareholders, to transact (under their orders) with the public ; to keep books and cash ; carry on correspondence, and generally attend to all necessary details. The constitutions of joint-stock companies contain the necessary provisions on these points ; likewise, as to the mode of electing future directors, whilst the company subsists ; the right of shareholders to transfer their shares of the company-stock ; the division of profits or loss among the shareholders ; and the winding-

up of the company, either upon its term of endurance coming to an end, or when, by losses in the business, it shall be necessary or plainly expedient to wind it up. These provisions are, in principle, very much akin to those of the private contract of copartnery.

The writings, by which joint-stock companies are constituted, are various; consisting of—sometimes Statute alone; sometimes a contract of copartnery, or deed of constitution alone; sometimes both Statute and contract or deed of constitution.

CONSTITUTION
OF JOINT-STOCK
COMPANIES.

Those of the first class, constituted by Statute alone, have their general provisions—that is, such as are usual in all ordinary joint-stock companies—laid down in the Act 8 & 9 Vict. cap. 17, called the ‘Companies Clauses Consolidation (Scotland) Act 1845;’ which is applicable to the constitution and management of all joint-stock companies formed by Statute, in Scotland, after its date. These provisions have reference to the distribution of the capital of the company into shares or stock; the evidence of proprietorship of shares, by means of a register of share or stock holders; the transmission of shares to purchasers, heirs, and others; the calling up, from shareholders, of the amount of the shares for which they have subscribed their names; the powers conferred on the company of borrowing money, and the granting of relative deeds. Then follow the regulations as to the management of the company; general meetings of shareholders; their votes; the election of directors; the powers of the directors, and their general mode of proceeding; the appointment of auditors, and their duties; the security to be taken from officers intrusted with company-money; the keeping of accounts, balancing of books, and ascertaining profits or loss; making dividends of profit, which are never to be made so as to reduce the capital stock; power to make bye-laws; appointment of arbitrators to settle differences directed to be settled by arbitration; the service of summonses or notices upon the company; and the mode of recovering penalties affecting either the company, or others, under their Acts.

THE COMPANIES
CLAUSES CON-
SOLIDATION
(SCOTLAND)
ACT 1845.

Each company, of the class now before us, has a special Act, with which the provisions of the above general Act are incorporated, so far as applicable, and so far as not varied or altered. The object of the special Act is to fix the name of the company; to describe its business; to declare its domicile; to name its first directors; and, in general, to put in active operation a company, intended to execute a specified undertaking, or to carry on a particular business, in accordance with the provisions of the general Act.

SPECIAL ACT.

Joint-stock companies of the second class (those constituted by contract of copartnery or deed of constitution alone) have, in their contract, or other deed, very much the same provisions as those of the incorporated companies, as contained in the special and general Acts; with this addition, that they will often, particularly in the case of insurance companies, have to define the nature of the securities, or investments, on which company-funds are to be employed; and they will always con-

JOINT STOCK
COMPANIES CON-
STITUTED BY
CONTRACT OF
COPARTNERY.

tain provisions for accomplishing the dissolution of the company, and for winding up its affairs, in case of the loss of a certain proportion of their capital.

JOINT-STOCK
COMPANIES ACTS
OF 1856, 1857,
AND 1858.

By the Joint-Stock Companies Acts of 1856, 1857, and 1858,¹ joint-stock companies then future, consisting of more than twenty partners, other than companies for the purposes of banking and insurance, were required to be constituted and regulated according to the provisions of these Acts, unless they were constituted by special Act of Parliament, or Royal Charter, or Letters Patent. And future banking companies, consisting of more than ten partners, were required to be constituted and regulated according to the provisions of these Acts, along with the Joint-Stock Banking Companies Act of 1857,² if not on the principle of limited liability; and with the last-mentioned Act, and the Act of 1858,³ if on the principle of limited liability.

But there is one very important privilege of a statutory corporation, which is excepted and declared not to be conferred by the Acts in favour of our more modern banks. I mean limitation of liability consequent on incorporation. A proper company, whether for banking or other purposes, has a separate *persona* for particular purposes. But the partners or shareholders are not sunk. On the contrary, they are jointly and severally liable for the company-debts, and any one of them can be sued for such debts because they are partners. The members of a corporation, however, appear to be in a different position. They have no existence separate from the corporation, or corporate *persona*. They are not partners of a company, but members of a corporation; and persons dealing with the corporation do not deal with its members, who accordingly cannot be sued for the corporation debts. In the recent Acts I refer to, however, it is expressly declared that the shareholders are to remain liable after incorporation for the debts of the corporate body, in the same way as they previously were for those of the company.

The Joint-Stock Companies Acts were imperative not only as to then future companies, as above, but likewise as to all companies (other than those for banking and insurance) existing at the time of their being passed, and which were then registered under the Registration Incorporation and Regulation Act of 1844,⁴ which applies only to such joint-stock companies, established in Scotland, as have an office or place of business in another part of the United Kingdom, and under the Limited Liability Act of 1855,⁵—which last Act does not apply to Scotland at all.

The Joint-Stock Banking Companies Act of 1857 was imperative, not only as to then future banking companies as above, but likewise as to all then existing banking companies consisting of more than seven

¹ 19 & 20 Vict. c. 47; 20 & 21 Vict. c. 14; and 21 & 22 Vict. c. 60.

² 20 & 21 Vict. c. 49.

³ 21 & 22 Vict. c. 91.

⁴ 7 & 8 Vict. cap. 110.

⁵ 18 & 19 Vict. cap. 133.

partners, and formed under the Joint-Stock Banking Acts of 1844¹ and 1846.²

And the Joint-Stock Companies, and Joint-Stock Banking Companies, Acts respectively could optionally be made available to joint-stock banking companies, and to joint-stock companies generally (other than those for insurance), consisting of seven or more partners, having a capital of fixed amount, divided into shares of fixed amount, and duly constituted by law; or, in the case of banks, legally carrying on the business of banking previously to the passing of the Acts, and not being companies thereby required to be registered.

The Acts before referred to (other than the Registration Incorporation and Regulation Act of 1844, and the Companies Clauses Consolidation Act, 1845) did not apply to insurance companies, unless falling under the Act of 1844, as being joint-stock companies, established in Scotland, and having an office or place of business in another part of the United Kingdom. Notwithstanding the subsequent Acts above specified, therefore, insurance companies, when they could not avail themselves of the Act of 1845, could be constituted only as formerly; that is, each by a separate and independent act of incorporation, or deed of constitution.

It was obviously expedient that the laws relating to all joint-stock companies, including those applicable to the purposes of banking and insurance, in whatever part of the United Kingdom their business was to be carried on, should be consolidated as far as possible, and that such amendments as observation or experience had shown to be desirable, should be sanctioned by Parliament; and accordingly 'The Companies Act, 1862,'³ was passed on 7th August 1862,—its commencement as to some particulars being its date, and as to all others, 2d November 1862. This Act, which is entitled 'An Act for the Incorporation, Regulation, and Winding-up of Trading Companies, and other Associations,' repeals the several Acts before detailed, previously passed for the regulation and incorporation of joint-stock companies, and joint-stock banking companies (other than the Act of 1844), subject to various qualifications and exceptions for the protection of then existing rights, obligations, and liabilities. The Act expressly includes insurance companies. Moreover, besides dealing with companies subject to unlimited liability, and to liability limited by shares, as was done in former Acts, the Act of 1862 introduces a new mode in which shareholders can limit their liability, viz,—by guarantee, which, as well as the mode of limitation by shares, will be presently explained.

Registration in the Register of Joint-Stock Companies, established by the Act of 1844, in order to incorporation, is the first great requirement of the Act of 1862, as it was also of the Act of 1856. By sect. 4 of the Act of 1862, such registration is declared compulsory as to every banking company 'consisting of more than ten persons;' and as to every other company having the acquisition of gain for its object, consisting of more

¹ 7 & 8 Vict. c. 113.

² 9 & 10 Vict. c. 75.

³ 25 & 26 Vict. c. 89.

'than twenty persons, formed after the commencement of the Act, unless such banking or other companies are formed in pursuance of some other Act, or of Letters Patent.' There is also another class of exceptions, but not applicable to Scotland.

After providing as above for the compulsory registration of future companies, the provisions of the Act of 1862 are, for distinctness' sake, arranged by sect. 5 into nine parts. These relate to—(1.) The constitution and incorporation of companies under the Act; (2.) The distribution of the capital and liability of the members of such companies; (3.) Management and administration; (4.) Winding-up; (5.) The Registration Office; (6, 7, & 8.) The application of the Act to companies registered under the Joint-Stock Companies Acts, to companies registered, but not formed, under the Act of 1862, and to unregistered companies; and (9.) Repeal of former Acts and temporary provisions.

It is not requisite or suitable here to enter minutely into the very numerous details of this Act. Some, however, of its provisions, as well as of the provisions of the former Acts, appear to call for particular reference. Moreover, the Acts of 1845, 1856, and 1862 are eminently Conveyancing Acts; the arrangement of which in parts, etc., is worthy of careful consideration. Many of the clauses, also, will be found useful as forms where they apply.

**INCORPORATION
UNDER THE ACT
OF 1862.**

I will notice, first, some of the provisions in Part I. of the Act of 1862, being the part which relates to the constitution and incorporation of companies under the Act; and, when doing so, I will occasionally point out the enactments on corresponding points, in respect to companies not formed under the Act. By sect. 6, it is provided, that 'any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this Act in respect of registration, form an incorporated company, with or without limited liability.'

**MEMORANDUM
OF ASSOCIATION.**

In the case of any company, whether with limited or unlimited liability, the memorandum of association is to contain—(1.) the name of the proposed company, and among other names the Act gives, as examples, 'The Patent Stereotype Company,' 'The Highland Hotel Company (Limited).' (2.) The part of the United Kingdom—whether England, Scotland, or Ireland—in which the registered office of the company is proposed to be situated. Every company, under the Act, is required (sects. 39 & 40) to have a registered office (or head-quarters), to which all communications and notices may be addressed; but in the memorandum of association it is enough to say that the registered office is to be in England, Scotland, or Ireland, without naming any town or place. The memorandum is also to state (3.) the objects for which the proposed company is to be established; for example, in the case of the 'Patent Stereotype Company,' 'The working of a patent method of founding and casting stereotype plates, of which method John Smith of London is the sole patentee.' In the case of the

‘ Highland Hotel Company (Limited), ’ ‘ The facilitating travelling in the Highlands of Scotland, by providing hotels, and conveyances by sea and by land, for the accommodation of travellers, and the doing all such other things as are incidental or conducive to the attainment of the above object.’

Where the liability of the company is to be limited, there is always to be added to the name (as in the example above given) the word LIMITATION OF LIABILITY ‘ Limited,’ as the last word in such name.

Where the limitation is by shares, the memorandum is to contain BY SHARES, (besides the three particulars above mentioned)—(4.) a declaration that the liability of the members is limited; and (5.) the amount of the capital with which the company proposes to be registered, divided into shares of a fixed amount; and each subscriber of the memorandum is to write opposite to his name the number of shares he takes, which must not be less than one. It is this subscription which defines the limitation of a member’s liability in the case of a company formed under the Act, and limited by shares.

In the case of a company limited by guarantee, the memorandum BY GUARANTEE. of association is to contain the first three particulars above expressed, as in the case of a company limited by shares, with a declaration that each member shall contribute to the company’s assets in case of the company being wound up whilst he is a member, or within one year afterwards, for payment of debts, liabilities, and expenses, as therein specified, such amount as may be required,—not exceeding a specified amount. It is this declaration which defines the limitation of a member’s liability in the case of a company formed under the Act, and limited by guarantee.

The Act of 1862, by sect. 12, allows of no alteration on the conditions contained in the memorandum of association, except that any company limited by shares may modify such conditions, if authorized to do so under its regulations, by increasing its capital, by the issue of new shares, or by consolidating and dividing its capital into shares of larger amount than its existing shares, or by converting its paid-up shares into stock. Any company may also (sect. 13) change its name, with the sanction of a special resolution of the company, and approval of the Board of Trade. Such change is also required (by sect. 20) when, through inadvertence or otherwise, any company is registered under a name identical with that by which a subsisting company (not being dissolved, and not consenting) is already registered, or so nearly resembling the same as to be calculated to deceive; but the rights and obligations of the company are to remain unaltered by the change of name.

The memorandum of association contains no provisions for commencing the business of the company, or directing its affairs and management. The regulations on these and all other details are intended, when expressed, to be contained in a separate document, called ‘ Articles of Association.’ As to this, the Act of 1862 provides, sect. 14, that the

ARTICLES OF
ASSOCIATION.

memorandum may, in the case of a company limited by shares, and shall, in the case of a company limited by guarantee or unlimited, be accompanied, when registered, by articles of association, signed by the subscribers to the memorandum, and prescribing such regulations for the company as the subscribers to the memorandum deem expedient. These regulations are to be expressed in separate paragraphs, numbered arithmetically; an arrangement very conducive to convenience when the document requires to be consulted or referred to. The subscribers may adopt all or any of the provisions contained in the table marked A. in the first schedule annexed to the Act; and in the case of a company, whether limited by guarantee or unlimited, that has a capital divided into shares, they shall state the amount of capital with which the company proposes to be registered.

The articles of association, when made use of, will specify the capital stock, if that is not expressed in the memorandum, and is of fixed amount, and divided into shares; also the amount of each share. When a company is limited by guarantee, and the stock is not divided into shares of fixed amount, the articles must (with a view to fix certain fees) state the number of the members with which the company is to be registered. The articles will further, as a general rule, prescribe such regulations for the company as the subscribers to the memorandum deem expedient.

The example of articles which forms Table A. of the first Schedule annexed to the Act, and which may be adopted in whole or in part, in the option of the subscribers to the memorandum, relates to the right of shareholders to share certificates; the powers of the directors as to calls on shares whilst the company is under their management; the transfer of shares *inter vivos*; the transmission of shares to husbands, executors, or trustees, on the marriage, decease, or bankruptcy of members; the forfeiture of shares; the conversion of shares into stock; increase of capital; general meetings of companies; proceedings at such meetings; votes of members; directors, their powers, disqualification, rotation, and proceedings; dividends; accounts, and audit thereof; and services of notices by companies upon members. Generally, the articles will also define the mode in which the business of each particular company is to be conducted.

In the case of a company limited by shares, if the memorandum is not accompanied by articles of association, or in so far as the articles do not exclude or modify the regulations contained in Table A., such regulations shall (sect. 15), so far as applicable, be deemed the regulations of the company.

The articles are directed to be printed (sect. 16), and the memorandum and articles respectively are appointed (sects. 11 & 16) to bear the same stamp as if they were contained in a deed, and to be authenticated in the way pointed out in a former part of this course.¹

The memorandum and articles of association, when registered, are

¹ See *ante*, p. 92.

declared to bind the company and the members thereof to the same extent, as if each member had subscribed his name and affixed his seal thereto, and there were therein contained a covenant, on the part of himself, his heirs, executors, and administrators, to conform to all the regulations contained therein, subject to the provisions of the Act; and all moneys payable by any member to the company, in pursuance of the conditions and regulations of the company, shall be deemed to be a debt due from such member to the company, and in England and Ireland to be in the nature of a specialty debt.

The examples of articles introduced by the Act of 1862 will, practically, supersede in most cases the provisions on corresponding subjects contained in the Act of 1845, and they will now, as to future companies, wholly supersede the corresponding provisions of the repealed Act of 1856. As to companies existing at the time of the commencement of the Act of 1862, corresponding provisions in the Act of 1856, and forming Table B. in the Schedule of the Act of 1856, are not repealed.

There is thus to be registered, in the formation of every company under the Act of 1862, the memorandum of association, which in most cases will be accompanied by articles of association. Upon the registration of the memorandum, and of the articles, in cases where such articles are required by the Act, or by the desire of the parties, to be registered, the registrar is, by sect. 18, directed to certify that the company is incorporated; and, in the case of a limited company, that the company is limited; the subscribers of the memorandum of association, with such other persons as may from time to time become members of the company, shall thereupon be a body corporate, by the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession, and a common seal, with power to hold lands.

The Act of 1856, as extended and amended by those of 1857 and 1858, was apparently intended to give to all joint-stock companies (except insurance companies), and the Act of 1862 seems in like manner intended to give to all joint-stock companies, including insurance companies, the benefits and privileges previously conferred by Act of Parliament alone, without requiring such companies to incur the heavy expense of an application to Parliament for a special Act. But whether incorporation under the provisions of the Act of 1862 is in all cases equivalent to 'Incorporation by Act of Parliament,' has been doubted. The Pupils Protection Act of 1849, by sect. 27, allows the Court, if they deem it expedient, to accept, by way of caution for judicial factors, bonds or policies of the British Guarantee Association, 'or other public company incorporated by Act of Parliament or Royal Charter,' carrying on business in Scotland, instead of bonds of caution by private individuals. A bond or policy by 'The National Guarantee and Suretyship Association, limited,' which was formed and registered under the Act of 1862,

was offered to the Court, on the strength of that enactment, and declined ; and, in the course of the relative discussion, doubts were expressed whether such association could, as a company merely incorporated under the Act of 1862, and not having a special Act of Incorporation, be held to be 'incorporated by Act of Parliament,' in the sense of the Pupils Protection Act.¹

LIABILITY OF
MEMBERS OF
COMPANIES
UNDER THE ACT
OF 1862.

Your attention will now be called to the important subject of the liability of the members of companies formed under the Act of 1862. On that critical point, the Act (sect. 38) provides that, in the event of a company so formed 'being wound up, every present and past member of such company shall be liable to contribute to the assets of the company, to an amount sufficient for the payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories' (that is, not only the persons liable to contribute, but those alleged to be so liable, until they are legally exempted), 'amongst themselves, with the qualifications following' (that is to say)—(1.) No past member shall be liable to contribute, if he has ceased to be a member for a period of one year or upwards prior to the commencement of the winding-up. (2.) No past member shall be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member. (3.) No past member shall be liable to contribute, unless it appears to the Court (that is, in Scotland, the Court of Session, in either of its divisions) 'that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act. (4.) In the case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member. (5.) In the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount of the undertaking entered into on his behalf by the memorandum of association.'

In regard to unlimited companies formed under the Act, this enactment leaves the liability of existing members, as at the time of the commencement of the winding-up, just as it was. But with regard to past members, the Act makes some material changes on what would formerly have been such members' liability by the law of Scotland. In the first place, as to debts contracted by the company before the membership ceased, every past member would, under the old law, be liable to the creditor in a public equally as in a private company, until the debt was paid, or (as to him) discharged, the past member having right of recourse against the existing members for obtaining relief from all such debts. Now, a past member of a company formed under the Act is free of liability, even for debts contracted during his membership, if he has ceased

¹ Sim, 5th Dec. 1863, 2 Macph. 205.

to be a member for one year before commencement of the winding-up. In the second place, in regard to debts contracted by a company after the membership ceased, the exact limit of a past member's liability, and the mode in which he was to proceed in order to secure immunity from future liability, were perhaps not very clearly defined by the old law. But it is thought that a past member, notwithstanding his ceasing to be a member, would remain liable to the creditors in all debts contracted by the company up to the time when, by the appropriate steps being taken, such creditors respectively were certiorated, or in point of law were bound to have known, of the fact of his having ceased to be a member; the past member having in this case right of recourse as aforesaid. Now, a past member of a company formed under the Act of 1862 is free of all debts contracted by the company after he ceases to be a member. And, in the third place, it is at once placed in the discretion of the Court, and withdrawn from the direction of any private party, whether, in the circumstances of each company being wound up, a past member, liable, if need be, to contribute, ought to be called on to contribute to the assets of such company. This provision may be practically of very great value. Trustees or others acting for creditors are naturally over anxious to secure the full payment of the debts due by an insolvent or bankrupt company, and they may fear possible liability to themselves if they allow any one legally liable in payment to escape making contributions. From all unnecessary inconveniences in such cases the Court is now entitled to afford protection.

These changes in the law, though fully expressed only with reference to companies formed under the Act of 1862, appear, by sect. 176, to apply also to companies formed and registered under the repealed Acts of 1856, 1857, and 1858. By sects. 177 and 196, they appear further to apply to companies registered, though not formed, under the Act of 1862, or the Acts of 1856, 1857, and 1858, subject always to the provisions and qualifications expressed in these sections. The effect of these provisions clearly is (*inter alia*) to prevent registration, by itself, from operating relief from liability to the creditors in debts due by the company at the time of such registration. As to companies neither formed nor registered under the Act of 1862, the liabilities of members, past as well as existing at the commencement of the winding-up, are not to be affected by that Act.

In regard to companies with liability limited either by shares or guarantee, it may be useful to notice that the members are not severally liable to contribute to the assets for payment of the debts of the company to the extent of the aggregate amount of the subscribed capital not paid up. When the limitation is by shares, each member is liable only for the unpaid portion, if any, of the shares subscribed for by himself. When the limitation is by guarantee, each member is liable only to the extent of the unpaid portion, if any, of the sum he himself has undertaken to contribute; and the limitation holds in either case, although by

LIABILITY
LIMITED BY
SHARES OR
GUARANTEE.

the failure of copartners a portion of the debts lawfully contracted by the company from third parties may remain unpaid. The mere list of the names of the members, therefore, of a company, limited either by shares or by guarantee, forms no criterion of the responsibility of such company for its ordinary debts and engagements.

It is to be observed, however, that by sect. 182, which is placed in Part VII. of the Act (being the part which relates to companies authorized to register, but not formed, under the Act), no banking company claiming to issue notes shall be entitled to limited liability in respect of such issue. The members are to be liable for the whole amount of the issue, in addition to the sum for which they would be liable as members of a limited company. From the position in which this provision is placed, it may be doubted whether it is applicable to companies formed under the Act, though such companies are not expressly excluded from its operation.

It is further worthy of observation, that, by sect. 188, every banking company existing at the date of the Act, which registers itself as a limited company, is required, in order to make the registration effectual in the case of each party concerned respectively, at least thirty days previous to obtaining a certificate of registration with limited liability, to give notice of the intention so to register, to every person and partnership-firm who have a banking account with the company. Failure to give the notice, in any case, leaves the liability in such case as it was before the registration. And, by sect. 194, the registration of any company in pursuance of Part VII. is not to affect or prejudice such company's liabilities or rights, in regard to any debt incurred or contract entered into previously to such registration.

**POWER OF
HOLDING LAND.**

With regard to holding land, the Act of 1862 appears to impose no restriction on companies formed for purposes of gain. But, by sect. 21, no company formed for the purpose of promoting art, science, religion, charity, or any other like object not involving the acquisition of gain, can, without the sanction of the Board of Trade, hold more than two acres of land. The Board of Trade, however, may empower any such company to hold lands in such quantity, and subject to such conditions, as they think fit.

**TRUSTEES AND
EXECUTORS
HOLDING
SHARES.**

The Act of 1862 makes some material alterations on the former law, as regards trustees and executors having right to shares in companies formed under the Act.

The Companies Clauses Act of 1845 provided, by sect. 21, that companies under that Act were not to be responsible for the due execution of trusts by trustees holding shares; and the Acts of 1856 and 1857, now repealed, provided that, whilst the register of the shareholders should be the proper evidence as to who were the partners, no notice of any trust should be entered on that register or receivable by the company. Under this provision, apparently, trustee-shareholders must have been rendered personally responsible in the first place to the creditors of the company

for the debts of the company, reserving to such trustees any claim competent for relief out of the trust-estate under their management.

The Act of 1862, sect. 30, contains a provision on this point similar to that of the Act of 1856, but only as applicable to the case of companies formed under the Act of 1862, and registered in England or Ireland. Apparently, therefore, there is nothing in the general Statute law to prevent trustee-shareholders, under the Act of 1862, in a Scotch company, from being entered as such in the register of shareholders, or from having notice of the trust under which they act received by the company, and entered in that register. In the case of *Lumsden*¹ the question was, whether trustees who had express power by their trust-deed to invest the trust-funds in the stock of any bank in their own names, and who bought shares in a bank which made calls on them as shareholders for contributions towards payment of its debts to third parties, were liable to make good such calls personally, or only as trustees, and to the extent of the trust-funds in their hands. The decision in the Court of Session was that they were liable only *quod* trustees, and to the extent of the trust-funds in their hands; but, on appeal, the House of Lords held that the trustees were personally liable, not only to the creditors of the company, but also in questions of contribution *inter socios*.

A very material amendment of the law is made by the Act of 1862 in reference to the position of the personal representatives of a deceased member of a company under the Act of 1862, when such representatives wish to avoid incurring such risk as may attach to membership in such company. By the law as it formerly stood, such representatives, however unwilling to be members of the company, could not dispose of the shares to which they had right in their character of representatives, without, in the first place, being entered and registered as members in the company's books, and, of course, incurring whatever liability such entry and registration legally involved; but, by sect. 24 of the Act of 1862, 'Any transfer of the share or interest of a deceased member of a company under this Act, made by his personal representatives, shall, notwithstanding such personal representative may not himself be a member, be of the same validity as if he had been a member at the time of the execution of the transfer.' This enactment, whilst perfectly equitable as regards the creditors of the company, must operate in many cases as a great relief to the representatives of parties deceased.

The Act makes the following provisions as to the execution of promissory-notes and bills on behalf of companies under the Act, and of deeds executed abroad, on behalf of such companies:—'Promissory-notes or bills are,' by sect. 47, 'to be made, accepted, or indorsed in the name of the company, or by or on behalf or on account of the company, by any person acting under the authority of the company.'

TRANSFER BY
EXECUTORS.

BILLS AND
DEEDS EXE-
CUTED ABROAD.

¹ *Lumsden*, 26th Feb. 1864, 2 Macph. 695; reversed 22d June 1865, 4 Macq. 950.

By sect. 55, 'Any company under this Act may, by instrument 'in writing under its common seal, empower any person, either generally, or in respect of any specified matters, as its attorney, to execute 'deeds on its behalf in any place not situate in the United Kingdom; and every deed signed by such attorney on behalf of the 'company, and under his seal, shall be binding on the company, and 'have the same effect as if it were under the common seal of the company.' This last provision appears not to have been practically sufficient for its purpose. Supplementary enactments on that subject have been made by 'The Companies Seals Act, 1864.'¹ By sect. 2, any company under the Act of 1862, whose objects require or comprise the transaction of business in foreign countries, is empowered to prepare an official seal, to be used in authenticating deeds, etc., on behalf of the company, in every place out of the United Kingdom in which the business of the company shall be carried on. The Act gives minute directions as to the character of the official seal; and the person by whom, and the manner in which, it is to be affixed to such deeds, etc., but these, of course, need only to be referred to here.

PROVISIONS AS
TO WINDING-UP
OF PUBLIC COM-
PANIES.

The Act of 1862 contains elaborate and minute provisions for the winding-up of companies 'under it' (not merely 'formed' under it, but generally 'under it'), judicially or voluntarily; and the Court may direct a voluntary winding-up to be conducted under judicial supervision.

By sect. 79, a company under said Act may be wound up judicially in the Court of Session, in the following circumstances, viz.:(1.) Whenever the company has passed a special resolution, requiring the company to be wound up by the Court; (2.) Whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year; (3.) Whenever the members are reduced in number to less than seven; (4.) Whenever the company is unable to pay its debts; and (5.) Whenever the Court is of opinion that it is just and equitable that the company should be wound up. And, by sect. 80, a company under the Act shall be deemed unable to pay its debts, in the following cases:—(1.) Whenever a creditor in a sum exceeding £50 then due, has served on the company, by leaving at their registered office, a demand, under his hand, requiring the company to pay the sum so due, and the company has, for three weeks after the service of such demand, neglected to pay the debt, or to satisfy the creditor. Case (2.) does not apply to Scotland. Case (3.) Whenever, in Scotland, the *induciae* of a charge for payment on an extract-decree, or an extract registered bond, or an extract registered protest, have expired without payment being made; and (4.) Whenever it is proved to the satisfaction of the Court that the company is unable to pay its debts.

¹ 27 & 28 Vict. c. 19.

The application to the Court, for winding up a company under the WINDING UP. Act, is to be by petition, and may be presented by the company, or by one or more of the creditors or contributories of the company, or by all or any of the above parties together or separately, and a winding-up of the company by the Court shall be deemed to commence at the time of the presentation of the petition for winding up.

By sect. 129, a company under the Act may be wound up voluntarily—(1.) Upon expiry of the period, if any, fixed for the duration of the company by the articles of association, or upon the occurrence of the event, if any, upon which it is provided by the articles that the company is to be dissolved, and whenever the company, in general meeting, has passed a resolution requiring the company to be wound up voluntarily; (2.) Whenever the company has passed a special resolution requiring the company to be wound up voluntarily; (3.) Whenever the company has passed an extraordinary resolution to the effect that it has been proved to their satisfaction that the company cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up the same; and a voluntary winding-up shall be deemed to commence at the time of the passing of the resolution authorizing such winding-up.

Power is also given, by sect. 147, to the Court, when a resolution has been passed by a company to wind up voluntarily, to make an order directing that the voluntary winding-up shall continue, but subject to such supervision of the Court, and with such liberty to creditors, contributories, or others, to apply to the Court, and generally upon such terms and subject to such conditions as the Court think just.

Winding up judicially, or under the supervision of the Court, will probably take place most frequently when companies are insolvent. In such cases there is always the risk of undue or fraudulent preferences being acquired by particular creditors, by legal proceedings, or voluntary deed. For preventing this, and generally all unnecessary change of circumstances after the commencement of such winding-up, the Act of 1862, by sect. 153, provides, that 'where any company is being wound up by the Court, or subject to the supervision of the Court, all dispositions of the property, effects, and things in action of the company, and every transfer of shares, or alteration in the status of the members of the company, made between the commencement of the winding-up and the order for winding up, shall, unless the Court otherwise orders, be void.' Further, the Act, by sect. 163, provides, that where any company is being wound up by the Court, or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company, after the commencement of the winding-up, shall be void to all intents. And, with reference to any case of winding up, whether judicial or voluntary, or under judicial supervision, the Act, by sect. 164, provides, that 'any such conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property, as would, if made or done by or

'against any individual trader, be deemed, in the event of his bankruptcy, to have been made or done by way of undue or fraudulent preference of the creditors of such trader, shall, if made or done by or against any company, be deemed, in the event of such company being wound up under this Act, to have been made or done by way of undue or fraudulent preference of the creditors of such company, and shall be invalid accordingly; and for the purposes of this section, the presentation of a petition for winding up a company shall, in the case of a company being wound up by the Court, or subject to the supervision of the Court, and a resolution for winding up the company, shall, in the case of a voluntary winding-up, be deemed to correspond with the act of bankruptcy in the case of an individual trader.' Moreover, in order to prevent companies formed under the Act of 1862 from evading the provisions of the Act as to winding up, the Act declares, by the same section (164), that 'any conveyance or assignment made by any company formed under this Act of all its estate and effects to trustees, for the benefit of all its creditors, shall be void to all intents.'

All these provisions are, by sects. 176, 177, applicable to companies formed and registered under the Acts of 1856 and 1857, and to companies registered but not formed under these Acts. They will be applicable also (sect. 180) to all companies authorized to be registered, and which are registered under Part VII. of the Act of 1862, even though the registration of such companies is with a view to being wound up. Under Part VIII., sect. 199, the provisions as to winding up will apply in the case of an unregistered company being wound up under the Act, subject to the exceptions and with the additions expressed in said section. Amongst these is a declaration that no unregistered company shall be wound up under the Act voluntarily, or subject to the supervision of the Court. Judicial winding-up, therefore, is the only mode competent in the case of an unregistered company.

LIQUIDATORS.

The conduct of the winding-up of companies under the Act is to be committed to official persons, called liquidators, whose powers and duties correspond in many respects with those of the trustees in sequestrations of bankrupt estates, or judicial factors or others winding up solvent estates in Scotland. Two or more liquidators can be appointed for winding up an estate; and it was held that the appointment of four liquidators in the voluntary winding-up of a joint-stock banking company under the Acts of 1856, 1857, and 1858, was not a joint appointment, and did not fall by the resignation of one of them; but that all the powers of liquidators could be exercised by the remaining appointees.¹

With reference to winding up, the Act of 1862, sect. 122, declares, that orders, interlocutors, and decreets of the Court of Session are to have execution in England and Ireland, as well as in Scotland; and orders of

¹ Liquidators of Western Bank, January and March 1860, 22 D. 447.

the English and Irish Courts specified in the Act are to have execution, not only in England and Ireland, but also in Scotland, such execution being in the Courts in which execution would have originated, if the registered office of the company had been situated in that part of the United Kingdom within which execution is sought.

By Part VI the Act of 1862 is declared (sect. 176) to apply to companies formed and registered, and (sect. 177) to companies registered, but not formed, under the repealed Acts of 1856, 1857, and 1858, or any of them, in manner and subject to the exceptions and qualifications expressed in these sections respectively. All the companies here referred to being already registered in terms of the former Acts, and these being repealed by the Act of 1862, this provision was required in order to give these companies proper regulations in lieu of those contained in the repealed Acts; and it was of course desirable, as far as possible, to make these the same as the regulations laid down for future companies by the Act of 1862.

By Part VII. the Act of 1862 authorizes (sect. 180), subject to the exceptions and regulations expressed in sect. 179, the voluntary registration, under the Act, of every company existing at the time of the commencement of the Act, consisting of seven or more members; and of any company thereafter formed in pursuance of any Act other than that of 1862, or of letters-patent, or being otherwise duly constituted by law, and consisting of seven or more members. Such companies can be registered, under the Act of 1862, as companies unlimited, or limited by shares, or by guarantee, and the registration may be for the sole purpose of winding up.

Upon such companies complying with the requisitions contained in Part VII. of the Act with respect to registration, they are, by sect. 191, to receive from the registrar a certificate of incorporation, and, in the case of a limited company, that the company is limited; and the members are thereupon to be a body corporate, by the name by which they are registered, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, with power to hold land. And there is this special provision applicable to Scotch Banking Companies,—‘Any banking company in Scotland so incorporated shall be deemed and taken to be a bank incorporated, constituted, or established by or under Act of Parliament.’ Apparently this clause was intended to secure, for banking companies obtaining incorporation under the Act of 1862, the privilege of receiving Government and judicial deposits of money, and of obviating as to such banking company the question already referred to as having occurred in relation to the statutory character of the ‘National Guarantee and Suretyship Association, limited.’ It is perhaps unfortunate that the clause was not framed comprehensively, instead of being confined to banking companies.

In reference to the transfer of the property of a company already

formed, to what is practically the same, though legally a new, company incorporated under the Act of 1862, sect. 193 provides, that all property, including all interests and rights in property, 'real and personal, and all obligations, and things in action belonging to or vested in the company at the date of its registration under the Act, shall, on registration, pass to and vest in the company as incorporated under the Act, for all the estate and interest of the company therein.'

The company, as incorporated, is here placed in the same position, as to property and claims, with the same company before its incorporation. This, which is clearly the right arrangement, is a great improvement upon the corresponding clause of the Act of 1857. That clause transferred to the incorporated company, simply by force of its registration and incorporation, not the mere claim to property held in trust for the unincorporated company, but the actual right to such property,—an enactment which might sometimes lead to injustice.

The new company has right to claim all property held by third parties for behoof of the old, but the holders of such property may have counter claims, which ought to be disposed of before they are divested. The right of claiming the transfer of such subjects is, by the Act of 1862, clearly given to the incorporated company, but the holders are not denuded by the Act. Their right to state objections to divesting themselves remains untouched, and is left, as it ought to be, to the Common Law.

The Act of 1856 contains the wholesome provision, that directors paying a dividend when the company is insolvent, or by payment of which the company becomes insolvent, shall be liable, jointly and severally, for the company's debts to the amount of the dividend so paid. On this point the Act of 1862 simply proposes, as one of the regulations under Table A, that no dividend shall be payable, except out of the profits arising from the business of the company. But, although the Act of 1856 is now repealed, there can be no doubt that the law would enforce the liability of the directors, if this regulation should be adopted, and they should contravene it.

The provisions contained in Parts VIII. and IX. have already been to some extent referred to, and it does not seem necessary to notice them further here.

We shall now notice some points which have been before the Court in connexion with the constitution of joint-stock companies, or the powers of the directors, or which, for other reasons, seem to require special remark.

**DELECTUS
PERSONÆ.**

In private companies, there is essentially a *delectus personæ* preventing the introduction of an additional or new partner, or even the admission of a deceased partner's heir into the concern; and, likewise, when the contract is for a term of years, preventing any partner from withdrawing, during its currency, except with consent of all the others. In companies with numerous partners, *delectus personæ* is provided for only

in a very qualified way, if at all. The shares are usually made transferable, so as to let heirs take on their predecessors' death, and to allow of sales of the partners' shares, whereby the former shareholder goes out of the concern; and if the company has not, or does not exercise, the right of pre-emption, the new shareholder comes into the concern in his stead; the creditors of the company, in debts contracted before the seller goes out, retaining their claim upon him, unless he is exempted under the provisions of the Companies Act of 1862. But the right of substituting a new shareholder, by sale and purchase of shares, is not usually absolute, even in companies with numerous partners. It is common, in order to give the company a certain control over the new partners proposed for admission, to stipulate that, on any sale of shares, the first offer shall be made to the company. In this offer, the intended buyer, as well as the price offered, must be named; and, if the directors think fit, they can accept the offer, and purchase for the company. A stipulation of that nature, when it occurs, must be fairly implemented; and, if a written offer is conditioned for, verbal communings as to a transaction are not enough. Unless there is what amounts to a waiver by the company of the condition, a sale to a third party without the previous written offer to the company will be ineffectual.¹ PRE-EMPTION.

The due application or investment of the company-funds is a matter of the highest importance, and, as to this, the purposes declared in the act or deed of constitution form the rule for the guidance of the directors. It has accordingly been held incompetent for a company, incorporated for the construction of a particular railway, to invest any part of its funds in the stock of another railway company; and it is open to any shareholder to object to the misapplication of the company-funds.² INVESTMENT OF
COMPANY-
FUNDS.

The Limited Liability Act of 1855,³ applicable only to England and Wales, provides, sect. 10, against lending the company's money to any shareholder, and makes the directors who lend, or assent to the loan, jointly and severally liable for the amount. I do not observe a corresponding provision in any of the Acts applicable to Scotland, which, I think, is to be regretted.

As regards adopting judicial proceedings, we have seen that private companies, with proper company-names, by which they sign and accept obligations, can sue in the name of the firm. Incorporated joint-stock companies have the right to sue under their corporate name, or otherwise, as provided by their Act, or Charter, or Patent. Ordinary joint-stock companies, with a descriptive firm, such, for example, as the Northern Investment Company, may at common law sue in name of the firm, and of three or more individual partners. Banking companies which comply with the regulations of the Act 7 George IV. cap. 67 are entitled to sue by their principal officer; and when joint-stock compa- JUDICIAL
PROCEEDINGS.

¹ Gibson-Craig, 2d February 1848, 10 D. 576.

² Balfour's Trustees, 8th June 1848, 10 D. 1240.

³ 18 & 19 Vict. c. 133.

nies, by their contract, give power to their manager to sue, a partner of the company may be sued by such manager. All these points will be found in the case of the National Exchange Company of Glasgow.¹

CALLS.

By the constitution of a public company, the directors are usually entitled to require payment from the shareholders of their shares of the subscribed capital, or a certain portion thereof, for the purpose of carrying on the business of the company, by such proportions or instalments, technically known as *calls*, as the directors shall think proper. But, in reference to going concerns, the directors cannot make calls on the shareholders for more than their shares of subscribed capital, merely for the purpose of increasing the stock of the company, unless there is special power to do so in the deed of constitution, or without the partner's acquiescence, as in the case of *Sturrock*.² And a general power to a certain number of the partners of a company to alter the articles of copartnery does not authorize the increase of the capital.³ This point was decided according to the opinions of the majority of the whole Court. But it appears to be in the power of a company, without the aid of Statute, to make calls on shareholders, or, more properly speaking, to require contributions from them, for the liquidation of the company-debts. A bank, in the course of being wound up, and which had confessedly lost a very large sum beyond its whole subscribed capital, was found entitled to call upon shareholders not only to pay up their proportions of subscribed capital, but also to contribute a further sum to be applied, along with the capital stock, in discharging debts.⁴

The Joint-Stock Companies and the Joint-Stock Banking Companies Acts gave full power to require contributions from shareholders for the above purpose, in the case of all companies subject to the operation of these Acts, and which were in the course of being wound up; and, moreover, they gave power to require contributions, to a certain extent, from shareholders who had sold out within three years from the commencement of the winding-up in the case of an unlimited company, and one year in the case of a limited company, the shareholders in the latter case being respectively liable only for any balance of their portion of the capital stock actually unpaid; and if the limited company was a banking company issuing notes, for such unpaid balance, and the amount of the notes issued. The Act of 1862 gives corresponding powers for making calls, sects. 102, 133, on the members liable to contribute to the assets of companies in the course of being wound up, as has already been explained; but it will be recollected that by sect. 38 the liability to contribute to such assets ceases at the end of one year after having been a member, as well in the case of an unlimited as of a limited company.

In cases of compulsory winding-up, or where the Court of Session

¹ National Exchange Company of Glasgow, 5th Dec. 1848, 11 D. 179.

² *Sturrock*, 21st February 1851, 13 D. 762.

³ *Monro*, 5th Feb. 1851, 13 D. 595.

⁴ *Douglas, Heron, & Co.*, 24th July 1773, M. 14,605; see also *Buchanan*, 21st Feb. 1855, 17 D. 461.

has issued an order for the continuance of a voluntary winding-up, the Court might, by the Amendment Act of 1858, sect. 5, on the production, by the liquidators, of a list of the contributories, and of the amount due by each, pronounce forthwith a decree against such contributories for payment of such amount, in the same way, and to the same effect, as if they had severally consented to registration, for execution on a charge of six days, of a legal obligation to pay such calls. The decree may be extracted immediately, and no suspension thereof is competent, except on caution or consignment, unless with special leave of the Court. The same provision forms sect. 121 of the Act of 1862, applicable to the case of winding-up by the Court.

DECREET
AGAINST CON-
TRIBUTORIES.

Under the Act of 1858, the liquidators of a bank, in the course of being wound up voluntarily, were found entitled, on petition to the Court, to summary decree against certain contributories, named in a certified list, to enforce payment of calls made by the liquidators, without notice of the petition to the parties against whom it was directed; the Court being satisfied that, under all the circumstances, the proposed exercise of power would be just and beneficial.¹ The granting of such applications appears, however, to be a question of circumstances. But the power of summary enforcement of calls, given to liquidators by the Statute, in the case of companies being wound up, applies only to calls made by the liquidators themselves, and cannot be sought for by them for enforcing payment of calls made by the directors whilst in the management of such companies.²

It may here be noticed, that, in the case of a company carrying on its business after an instalment is called for by the directors, the amount thereof is a debt due by the shareholders to the company, which a creditor of the company can arrest in the hands of the shareholders.³ On the other hand, the interests of the shareholders in a joint-stock company are personal estate, and as such, as a general rule, are arrestable at the instance of the creditors of the shareholders, in the hands of the company, as holders of the fund. An exception occurs in the case of the Royal Bank of Scotland, whose charter of incorporation declares that the stock-holders' interests shall not be arrestable; and there may be similar provisions in other deeds of incorporation. In cases where such declarations are made by competent authority, I apprehend that the diligence of adjudication should be resorted to for attaching a shareholder's interest;⁴ though, even in the face of such a declaration, it may perhaps be the safest course to proceed by arrestment also, as essentially the proper mode of attaching personal estate.⁵ In cases where there is no such provision, or where the provision, if it exists, is merely by a private contract, there can be no doubt that arrestment is the proper form of dili-

ARRESTMENT.

¹ Lumsden, 14th Dec. 1858, 21 D. 110.

² Mitchell, 16th July 1863, 1 Macph. 1116.

³ Hill, 13th Nov. 1849, 12 D. 46.

⁴ Royal Bank of Scotland, 14th Feb. 1770, M. App. *voce* Adjudication, No. 3.

⁵ See as to this, Alison, 18th March 1707, M. 707.

gence to be adopted by an ordinary creditor.¹ In the case of *Sinclair*, the company was constituted by Act of Parliament, which declared the shares to be moveable estate, and did not exclude arrestment as a mode of attaching them. It was found that the shares were subject to arrestment, and that adjudication was not a competent diligence for attaching them. Whether a creditor, who was a party to the contract excluding arrestment, might be held barred from proceeding in that way, is a different question. Perhaps such creditor might be so barred, but even in that case it would seem the safest course not to omit arrestment. When arrestment is used, it will be served on the principal officer, at the head office of the company ; or, if the company is registered, at the registered office, in the way prescribed by the Companies Act of 1862, sect. 62.

The adjudging, or arresting creditor of a partner, will of course be postponed to the company itself, as far as such partner stands indebted to the company.

¹ *Sinclair*, 27th Jan. 1860, 22 D. 600.

TITLE V.

MOVEABLE REAL RIGHTS.

THE next subject for our consideration is that of deeds relating to corporeal moveables or real rights in moveables.

The personal bond, bill, and some other writs, are only the representatives of debts, and the rights which they constitute are styled 'incorporeal,' as having in themselves no proper tangible existence. But furniture, cattle, implements, plate, jewels, cash, and other corporeal effects, and likewise ships, are moveable, equally with debts due by bill, or personal bond. And though, when corporeal effects are to be transferred, the transfer may, except in the case of ships, be best accomplished, and the property acquired, by actual delivery and possession, the transfer in all cases may, and in the case of ships must, form the subject of a regular deed of transmission.

The deed of conveyance of corporeal moveables (other than ships) is generally called a disposition ; because, with strict propriety, it uses the words 'sell, dispoⁿe, convey, and make over,' as is done in the case of lands, not the word 'assign,' as in the case of debts or rights standing simply on obligations.

DISPOSITION OF
CORPOREAL
MOVEABLES.

Where the subjects have not already been contained in a conveyance or other deed, in which case the forms authorized by the Transmission of Moveable Property Act of 1862 will not apply, the clauses of the deed are,—(1.) The narrative, which, as in other cases, describes the grantor, the cause of granting, and generally, though not necessarily, the grantee. (2.) The dispositive clause, by which the grantor disposes, etc., to the grantee the particular subject of the transaction. And here special care must be taken to identify the subject. Thus, if furniture, farm-stock, implements, or the like, are conveyed, the whole must be enumerated, or referred to, as contained in an inventory, which the grantor will sign as relative to the deed, or in some other way clearly pointed out. (3.) The warrandice clause, which is from fact and deed. (4.) Clause of delivery, if the articles are delivered. (5.) The consent to registration for preservation and execution ; and lastly, the testing-clause. On these clauses, no remark appears necessary. But where the subjects have already been contained in a conveyance or other deed, the forms

authorized by the Act of 1862 can be employed in like manner as if the subject conveyed were a debt due by personal bond.

INTIMATION.

If the articles disposed are in the hands of a third party, the disposition ought to be intimated to him. This can be done in one or other of the modes authorized by the Act of 1862, which Act can be made use of in regard to the mode of giving intimation whether the deed intimated be in the form thereby authorized, or in any other form. Due intimation, legally proved, will complete the transfer; and what has already been said, on the subject of intimation of assignments of debts, will be applicable to intimations of dispositions of corporeal moveables in the hands of a third party. This is brought out in the case of *Eadie*,¹ where, however, sufficient intimation had not been given.

DELIVERY.

Where goods are in the hands of the seller, and the transfer arises upon an absolute *bond fide* sale, the transfer will be effectual as against the seller's creditors, notwithstanding that possession shall be retained by the seller; the old rule of law requiring delivery to the purchaser being now, to that extent, qualified by the Mercantile Law Amendment Act of 1856, sects. 1, 2, & 3. Should the seller, however, make a second sale, and deliver the goods to the second purchaser,—the property will pass to the second purchaser, to the exclusion of the first. Delivery, therefore, in the case of goods which the seller has in his own hands, is still necessary to divest the seller, and make the transfer complete and effectual in every respect.

INSTRUMENT OF
POSSESSION.

The *Style Book*² gives the form of a notarial instrument of possession taken by the disponent under a disposition of moveables, whereof the possession is retained by the seller. But such instrument is utterly ineffectual as against third parties, and, with regard to the disponent and his heirs, the disposition is itself a complete title. Where, however, a testator conveyed his house and furniture to trustees, for behoof of his son in liferent,—he always paying a specified yearly rent therefor,—and to his daughters in fee; the son's creditors were found not entitled to plead that the possession enjoyed by the son rendered the furniture his property, to the effect of subjecting the same to their diligence.³ And, even without the intervention of trustees, where a testatrix conveyed her furniture to her unmarried niece, excluding the *jus mariti* of any husband whom she might marry, the creditors of the niece's husband were found to be validly excluded, although he had married without a marriage-contract, and was (with his wife) in actual possession of the furniture.⁴ In such cases, however, it lies with the objector to prove that the furniture, or other moveables, claimed by the creditors, are among the articles liferented, or as to which the *jus mariti* has been excluded. And a husband cannot give his wife, after their marriage, a right of fee, preferable to the claim of his creditors, in furniture belonging to himself, and of which he retains the possession.⁵

¹ *Eadie*, 7th Feb. 1815, F. C.

⁴ *Young*, 26th June 1855, 17 D. 998.

² *Style Book*, ii. 248.

⁵ *Campbell*, 13th June 1648, 10 D.

³ *M'Millan*, 13th May 1837, 15 Sh. 916. 1280.

We now come to the important branch of Maritime Writs.

And, first, we shall take the contract for building a ship, observing that the principles on which this deed is framed are not different from those applicable to the framing of the contract for building a house, or any other fabric.

MARITIME
WRITS.
CONTRACT FOR
BUILDING A
SHIP.

The counter obligations of the parties are, on the one hand, to build a ship or vessel of a specified description; and, on the other hand, to pay a specified price for it.

The obligation to build usually bears, and ought always to bear, reference to a specification of all the particulars of material, dimensions, shape or plan, tonnage, and appurtenances; with a general provision that the ship is to be finished in all respects according to the custom applicable to similar vessels in the port or place where she is built, or some other general provision affording a rule as to all the particulars not fully detailed in the specification. The builder ought to be bound to complete the whole, and to have the vessel ready for sea, by a day certain; and a specified payment ought to be stipulated for, in name of liquidated damages (not penalty) for every day thereafter, during which the vessel shall, in the judgment, or at the sight, of a neutral party, mutually agreed on and named in the contract, remain unfinished.

The party for whom the ship is built will, on the other hand, become bound to pay the price, either in a slump sum, or at a certain rate per ton, or otherwise,—care being taken to make the amount of the price clearly ascertainable, if a slump sum is not specified. In general, the price will be payable by regulated instalments. The form in the Style Book¹ suggests, that the first instalment will be payable when the keel is laid; the second, if the vessel is of moderate size, when she is launched; and the third, when she is cleared at the custom-house; upon attestation by the neutral party, mutually agreed on, and named as above, that she is finished according to contract. But the instalments may be more numerous, and may have reference to other or a greater variety of stages in the ship's progress, according to circumstances. Forms of the building contract, and relative specification, will be found in the Style Book.²

A ship requires to be registered in order to have the privileges granted by law to British-built ships, or ships foreign-built, which become entitled to these privileges.—(Merchant Shipping Act of 1854, sect. 19.)³ And, unless so registered, the ship is not recognised as a British ship, nor entitled to receive from any officer of customs a clearance or *transire* for enabling her to proceed to sea.

In order to registration, in any case, the ship, whether British or foreign built, must (sect. 36) be surveyed by a person appointed under the Act; from whom a certificate must be obtained, stating the ship's tonnage, build, and other particulars descriptive of identity, as in Form A, annexed to the Act. A declaration of ownership must also be made by

¹ Style Book, ii. 537. ² Style Book, ii. 537 & 539. ³ 17 & 18 Vict. c. 104, s. 19.

the owner, or one of the owners, if there are more than one, as in Forms B and C, stating,—(1.) the name of the ship; (2.) whether British or foreign built; (3.) the port of registry, being the port or place at which the ship is registered for the time being (sect. 33); (4.) how the ship is propelled; (5.) the number of the decks, and various other particulars as to the build, rigging, etc.; (6.) the measurements; (7.) the tonnage. These particulars are followed by the proper declaration, in which the owner, describing himself by his residence, states—(1.) that he is a British subject, naming his birthplace; (2.) his residence; (3.) that he has taken the oath of allegiance to the Queen; (4.) the time and place at which the ship was built; (5.) the name of the master; (6.) that the declarant is entitled to be registered as owner or joint-owner of the ship, or of a certain number of shares therein; and lastly, that no one is interested in the ship who is not qualified to be the owner of a ship by the above Act. And, on the occasion of the first registering, certain additional particulars require to be instructed by evidence, as set forth in sect. 40 of the Act.

This declaration being made to the registrar, or other person authorized by the Act (sect. 38), and evidence furnished of the additional particulars set forth in sect. 40, if the case is that of the first registry,—and assuming that the particulars set forth in the declaration, and proved in evidence, are all as the law requires,—the registry takes place. This is done by the entry in the register-book, kept by the registrar, in terms of sect. 42, of—(1.) the name of the ship, and of the port to which she belongs, being the port or place at which she is registered,—and, by sect. 34, no change can be made in the name; (2.) the details as to tonnage, etc. comprised in the surveyor's certificate; (3.) the particulars of her origin, stated in the declaration of ownership; and (4.) the names and descriptions of her registered owners, and, if more than one, the proportions in which they are respectively interested in the ship.

**CERTIFICATE OF
REGISTRY.**

The entry in the register-book being duly made, a certificate of registry is issued, as in the Form D annexed to the Act, containing the same particulars as those entered in the register-book as above explained, and likewise the name of the master. The certificate of registry, however, is the evidence only of the ship's right to the privileges of a British ship. It manifests the ship's nationality, and identifies the ship. But it is to be used only for the lawful navigation of the ship, and is not subject to detention by reason of any title, lien, charge, or interest whatsoever, which any person may have or claim in the ship. Accordingly, a change of the master of the ship ought to be indorsed on the certificate of registry, and such change must be reported to the customs at London, and the officers of the customs may prevent any one from acting as master who is not marked in or on the certificate of registry as the last appointed master (sect. 46).

**SIXTY-FOUR
SHARES.**

The property in a ship must be divided into sixty-four shares, and, subject to the provisions with respect to joint-owners, or owners by

transmission, contained in the Act, not more than thirty-two individuals can be registered at the same time as owners of any one ship. No person can be registered as owner of a fractional part of a share. But any number of persons, not exceeding five, may be registered as joint-owners of a ship, or share or shares therein. Joint-owners are not, however, entitled to dispose, in severalty, of any interest in a ship, or share of a ship, in respect of which they are registered (sect. 37).

No notice of any trust, express, implied, or constructive, can be TRUSTS. entered in the register-book, or is receivable by the registrar. And, subject to any rights and powers appearing by the register-book to be vested in any other party (a mortgage, for example), the registered owner of any ship, or share therein, shall have power absolutely to dispose of such ship, or share therein, and to give effectual receipts for the price (sect. 43).

All changes of ownership, equally with changes of master, ought to be indorsed on the certificate of registry. But, agreeably to a notice appended to Schedule D of the Act, the certificate is not a document of title. 'It does not necessarily contain notice of all changes of owner-ship, and in no case does it contain an official record of any mortgages affecting the ship.' The certificate, however, has been held to afford such *prima facie* evidence of title as to enable the registered owners, to whom a transfer had been recently made, to obtain recal of arrestments of the ship, used by creditors of the former owners, although it was alleged that the transfer was fraudulent and collusive.¹

I now come to the mode of transferring ships, and it is to be observed, TRANSFERENCE OF SHIPS. that if the builder has got the ship registered in his own name, the owner must obtain from him a transfer, called a bill of sale. BILL OF SALE. As to all transfers, the above Act, sect. 55, provides 'that a registered ship, or any share therein, when disposed of to persons qualified to be owners of British ships, shall be transferred by bill of sale; and such bill of sale shall contain such description of the ship as is contained in the certificate of the surveyor, or such other description as may be sufficient to identify the ship to the satisfaction of the registrar, and shall be, in the Form marked E in the schedule hereto, or as near thereto as circumstances permit; and shall be executed by the transferrer in the presence of, and shall be attested by, one or more witnesses.' Formerly it was necessary to recite the certificate of registry in the bill of sale, under pain of nullity, but it is not so now.

The transferee requires to register his title, and, before that can be done, he must make a declaration, in the form of Schedule F, stating his qualification to be registered as owner of a share in a British ship, and containing a denial (similar to that required in the case of the original owner) of there being any person not qualified by the Act to be owner of British ships entitled as owner to any interest in the ship (sect. 56).

Every bill of sale, when duly executed, is to be produced to the regis-

¹ Duffus, 13th Feb. 1857, 19 D. 430.

trar of the port at which the ship is registered, with the above declaration by the transferee, whereupon the transferee is to be entered in the register-book as the owner, and the fact of such entry being made is to be indorsed on the certificate of ownership, with the date and hour thereof; and all bills of sale are to be entered in the register-book, in the order of their production to the registrar (sect. 57).

Ships are sometimes sold when at sea, or in circumstances when an inspection cannot previously be made; and, if in such cases there are defects in the ship with which the seller is acquainted, he is bound, at Common Law, to make the purchaser aware of such defects, otherwise the purchaser appears to have a good ground for reducing the sale.¹

MORTGAGES.

Ships may be made the subject of real or special securities by means of mortgages (sect. 66); for which deeds the above Act provides a form in Schedule or Form I. On production of the mortgage, the registrar of the port of registry is appointed (sect. 66) to register the same in the register-book; and by sect. 67 every mortgage is to be recorded by him in the order of time in which it is produced to him for that purpose. A memorandum of the registration, and of the day and hour thereof, is to be marked on the mortgage by the registrar. By sect. 69 mortgages are declared preferable, not according to their dates, but the dates of their registration. The Act of 1854 declares that mortgages, when registered, shall confer an indefeasible right upon the mortgagee; but this provision does not repeal the Scots Act 1696, cap. 5, as to securities for prior debts; and, if the mortgages constitute preferable securities for such debts, they are liable to be set aside, under the last-mentioned Act, in case of the grantor's bankruptcy within sixty days, on the same principles as those applicable to securities for prior debts over other subjects.²

POWER OF SALE.

Every registered mortgagee has power (sect. 71) to sell the ship, or share mortgaged, and to give effectual receipts for the purchase-money. But, if there are several registered mortgages, no subsequent mortgagee is entitled to sell, except under order of a competent Court, without the concurrence of every prior mortgagee.

TRANSFER OF MORTGAGE.

The rights of registered mortgagees may be transferred (sect. 73) by deeds of transfer, in the Form marked K annexed to the Act; and on production of the deeds of transfer the registrar is bound to enter the name of the transferee in the register-book, as mortgagee of the ship or share; and to make a memorandum of the entry on the deed of transfer, specifying the date and hour of such record. And, by sect. 68, whenever a registered mortgage has been discharged, an entry to that effect is to be made in the register-book by the registrar, on production of the mortgage-deed, with a receipt for the mortgage-money indorsed thereon, duly signed and attested.

Mortgagees are not, by reason of their mortgages, to be deemed owners; nor mortgageors to have ceased to be owners, except so far as is necessary for making their mortgages available as securities for their

¹ Duthie, 21st Jan. 1815, F. C.

² Anderson, 14th Jan. 1859, 21 D. 230.

debts; and mortgagees may absolutely dispose of the mortgages (sects. 70, 71). But, by taking a certain amount of possession of the vessel, and control of her and her earnings, a mortgagee may make himself liable for certain furnishings to the vessel.¹ It will be recollected that mortgages do not now require to be indorsed on the certificate of registry, as was formerly necessary.

The Act makes full provision for the transfer of ships, or shares thereof, or of mortgages, to husbands by marriage, to assignees or trustees on bankruptcy and sequestration, and to heirs and successors on death.

It likewise, in sect. 76, and following sections, gives power to any registered owner to dispose of his ship, or share thereof, by way of mortgage or sale, at any place out of the country in which the port of registry is situated. This is done by means of certificates of mortgage, or certificates of sale, obtained from the registrar, and which are like powers of attorney for mortgage or sale. They are in the form of Schedules M and N annexed to the Act, according as it is wished to give a power to mortgage, or a power to sell. But, before obtaining such certificate, the party desiring it must state to the registrar, to be by him entered in the register-book, the names of the parties who are to exercise the power, and various other particulars. This is necessary in connexion with the preferential rights to be given to creditors or purchasers by the exercise of the powers. The Act contains numerous other provisions relative to these powers; but it is unnecessary to enter into these, further than to say that, by sects. 80 and 81, no mortgage or sale, *bond fide* made under the powers, shall be liable to be impeached, by reason of the person by whom the power was given dying before the making of the mortgage or sale; nor (under certain qualifications) by his insolvency or bankruptcy.

Upon delivery of any certificate of mortgage to the registrar, he shall, after recording in the book any unsatisfied mortgages marked thereon, so as to preserve their priority, cancel the certificate; and in the case of certificates of sale, if a sale is made to one qualified to hold British ships, the ship is to be registered anew, and the certificate of sale is to be retained by the registrar; who, after indorsing thereon an entry of the sale, is directed to forward the certificate to the registrar of the former port, who shall make a memorandum of the sale in the register-book, and the registry in such book shall be held as closed, except as to outstanding mortgages. If no sale is made, the certificate is to be delivered to the registrar, who shall thereupon cancel the same, and enter the cancellation in a book; and every certificate, whether of mortgage or sale, when so cancelled, shall be void to all intents and purposes.

The terms employed in the Transmission of Moveable Property Act of 1862 appear sufficiently broad to include ships, and shares of ships, and mortgages thereon, where these belong to parties domiciled in Scotland; the Act in question having no operation except in Scotland. But pro-

CERTIFICATE OF
MORTGAGE OR
SALE.

CANCELLATION
OF CERTIFICATE.

¹ Russell, 13th June 1839, 1 D. 931.

bably the forms authorized by the Act of 1862 were not intended to be employed in such cases; and it is clearly advisable to adhere to the forms introduced by the Merchant Shipping Act of 1854, in all cases where such forms are suitable, in like manner as if the Act of 1862 had not been passed.

Bonds of bottomry and *respondentia*, however, the nature of which is just about to be explained, do not appear to be within the scope of the Act of 1854; and conveyances of such bonds can be written in the form authorized by the Act of 1862, and intimation thereof given in one or other of the modes thereby introduced.

BONDS OF
BOTTOMRY AND
RESPONDENTIA.

I now come to bonds of bottomry and *respondentia*, both of which are essentially contracts of hazard.

The former constitute securities over the ship, the latter over the cargo; and bonds of bottomry may be granted either by the owners, or, in certain circumstances, by the master. The owners can grant such bond at any time. It is for money borrowed; but it is a condition of the transaction in general, that repayment shall not be demanded if the ship shall be lost during her voyage; in consideration of which, a high rate of interest or premium is stipulated to be paid to the lender; and, if the ship is not lost, the bond is good both for the sum lent and the premium stipulated.

The master can grant such bonds only when a ship is in a foreign port; or in a situation where he cannot communicate with the owners; or when in absolute want of necessary supplies. On that account, the bond must bear to be granted for money borrowed for the use of the ship, as the master has no power to hypothecate the ship in any other way than for necessary furnishings. Neither has he power to bind the owners personally even for these. In the case of *Cochrane*,¹ the master had not only bound the owners (which it was beyond his power to do), but also given his own personal obligation. It was clearly in his power to undertake a personal obligation for the cost of the furnishings to the ship, equally as for any other sum or debt, but such obligation was not appropriate to a bond of bottomry. Neither can the master, though at a foreign port, make drafts by bill on the owners in favour of the owners' agent at such port, even for necessary disbursements. He cannot give to the sum contracted on account, for furnishings, the rank and privileges of a bill-debt. It remains, at best, a sum due on account.²

PREFERENCE.

Such bonds, when granted by the owners, are preferable according to priority of date. When granted by the master, the last in date is preferable over the others, and so on; the reason being that, in the case of the master's bonds, the last furnishings are necessary for preserving or securing those made before.

The bond of *respondentia* is granted by the person having right to the cargo on board a ship laden or being laden for a particular voyage,

¹ *Cochrane*, 14th Feb. 1854, 16 D. 548.

² *London Joint-Stock Bank*, 15th July 1859, 21 D. 1327.

intended to constitute a security over the cargo for repayment of the sum lent, with the stipulated interest or premium. But, as the bond of bottomry becomes nugatory if the vessel is lost, so the bond of *responsentia* is of no avail if the cargo is lost. It appears to be doubtful whether such bonds constitute effectual securities over the cargo, and whether they are any better than personal obligations.

This subject will be closed with a notice of the Charter-party, which is of the nature of a maritime lease; being, as exemplified in the Juridical Style Book,¹ a contract between the owners of a vessel and parties who desire to have the use of the vessel on hire for a particular voyage, or for a certain period of time. The owners grant and set the vessel to freight, to the hirer, for the voyage or period of time, as the case may be; engaging that she shall, within a period specified, be in good order, duly manned, and fit for navigation; that she shall be at a specified port, by a day named, ready to receive cargo on board; that the master shall receive the cargo, shall sail without delay to her destination, deliver the cargo, receive the home cargo, sail homewards without delay, and deliver the home cargo; the master not taking any other goods on board, and the owner being liable for goods lost or damaged, with 30 per cent. on their original cost.

CHARTER-PARTY.

On the other hand, the hirer engages to furnish cargoes, and to pay freight at the rate agreed on. The rate of demurrage is also fixed; that is, the rate at which the hirer may detain the ship in loading or unloading, for a certain number of days, beyond the time specified in the leading clause of the agreement. The owner reserves his lien on the cargo for the freight; and both parties become bound to fulfil their parts of the premises under a penalty.

The forms of various other maritime writs will be found in the schedules annexed to the Merchant Shipping Act of 1854, and in the Juridical Styles.² The Merchant Shipping Act,³ which is of great length, and is divided into eleven Parts, exempts from stamp-duty all instruments used in carrying into effect Part II., being that part of the Act which relates to 'British ships, their ownership, measurement, and registry,' and which we have before been considering. It likewise exempts from stamp-duty all instruments which, by Parts III., IV., VI., or VII. of the Act, are required to be made in forms sanctioned by the Board of Trade, if made in such forms; and all instruments used by, or under the direction of, the Board of Trade for carrying such parts of the Act into effect. These several Parts of the Act last mentioned relate respectively to masters and seamen, to pilotage, etc. A bond and vendition of a ship in security, however, is liable in the stamp-duty corresponding to the sum in the bond.⁴

STAMP DUTIES.

¹ Style Book, ii. 564.

² Style Book, ii. 568, *et seq.*

³ 17 & 18 Vict. c. 104, s. 9.

⁴ *Mories*, 24th Nov. 1843, 6 D. 97.

TITLE VI.

THE FACTORY AND COMMISSION.

PERSONS who are of full capacity to act by themselves can in general act by means of others empowered by them for that purpose. In like manner, minors and married women can act by means of others duly empowered by them, with consent of their curators and husbands respectively; and, in some other cases, the power of acting can be deputed by one person to another. The persons empowered by others to act for them are called factors, or commissioners, or attorneys; and the deeds by which they are appointed bear the name of factories, commissions, or powers or letters of attorney. These deeds are all, substantially, of the same nature. Where the party to be empowered is called a factor,—as in the ordinary case of one who is to uplift rents and manage a land-estate or house property,—the deed is called a factory. When the party is to have powers of a higher or larger and more unusual character,—for example, to sell land or to make up titles to an estate,—the term ‘commission’ is usually employed to describe the deed. The name of powers or letters of attorney, I think, is imported from England. It is usually employed as descriptive of empowering deeds which are to be used in England, or in the colonies or foreign parts; and for deeds authorizing the buying and selling of stocks or shares of stock in this country. But, provided the requisite powers are duly given, it matters not whether the deed is described by the one name or the other. We can have a commissioner to uplift rents, an attorney to sell lands or make up titles,—indeed the procuratory in conveyances of lands is often extended to the appointment of an attorney for the latter purpose,—and we can have a commissioner to buy and sell stocks and shares.

The great practical distinction, applicable to deeds of the class now before us, is that they are general or special, or both general and special.

GENERAL
FACTORY.

The general factory confers powers of management only of the most simple and ordinary kind.

SPECIAL
FACTORY.

The special factory authorizes to be done simply the act or acts which it expressly names, and nothing more. The nature of those acts may, or may not, be such as would fall under a general factory.

But factories are very often both general and special. We frequently

have added to a general factory a special clause, or set of special clauses, GENERAL AND SPECIAL FACTORY. applicable to one or more particular act or acts, or class of acts. In such cases, in conformity with the principles usually applicable to deeds with both general and special clauses, the special may operate a limitation of the general factory, as the special clauses will confine it to acts of the kinds authorized by these special clauses, and which may be less than a general factory would authorize. But it is usual to find the special clauses go beyond the general powers, and authorize acts which the general would not embrace.

The clauses of the factory, whether general or special, or both united, CLAUSES OF THE FACTORY. are as follows :—

1. The narrative or introductory, containing the cause of granting, which may be (for example) absence, or intended absence, of the granter from Scotland, sickness of the granter, or, generally, 'certain good causes and considerations.'

2. The nomination of the factor or factors.

3. The empowering clause or clauses, containing the description or enumeration of the powers which the factor or factors may exercise.

4. A declaration that all acts and deeds lawfully done by the factor or factors, in virtue of these powers, shall be equally valid as if done by the granter himself.

5. It is usually provided that the factory shall subsist until recalled by a writing under the granter's hand ; but a provision to that effect is not necessary either to make the deed good until recalled, or to give the granter power to recal.

6. The factor is taken bound to account to the granter for his intromissions, and to pay over the free balance of cash in his hands, whenever required ; and, if he is to have remuneration, it will here be said that he is to retain a reasonable sum on that account. But it is usual and proper to declare that persons transacting with the factor shall have no concern with this obligation to account, the same being merely personal, as between the granter and factor.

7. & 8. There will then be the registration and testing-clauses in usual form.

We shall consider these clauses in their order as above ; the only remark occurring on the narrative or introductory clause being, that the factory or commission, when of a very special nature, will require to contain a pretty full narrative in order to make the empowering clause intelligible.

As regards the appointment of the factor or factors, if two or more are named, the powers must be exercised by them jointly, unless the contrary is specified. It will generally be convenient to name the majority, while more than two survive and continue acting, to be a quorum ; and, in some cases, such as commissions for making up titles, the powers may with propriety be conferred on each of the parties APPOINTMENT OF FACTORS.

named, so that any one of them may perform all the necessary acts with or without concurrence of the others.

There may, or may not, be a *sine quo non*, as in the case of trusteeships.

POWERS OF
FACTORS.

As regards the powers, a mere general factory is of very limited operation. In words it says that the factor is to manage the granter's affairs, and act for him therein, as he could do himself. But, under such a deed, it is doubtful if the factor could do more than perform such acts of ordinary administration as are necessary to preserve his constituent's estate, and prevent it from becoming unproductive. I doubt if a factory so general would authorize the factor to uplift rents and interests, except in a case of emergency; and it is certainly usual to give special powers when such acts are to be executed.

In cases such as the following, the general factory will not (save in very exceptional circumstances) serve; special powers must be conferred on the factor:—

1. Where lands or other heritable estate are to be sold by him for the owner. The importance of being clear and explicit, in framing the powers of a factory as to this point, will be shown by the case of Thomas.¹ The Court were there equally divided upon the question whether the factory, which was by testamentary trustees, in favour of one of their own number, was, by itself, so expressed as to confer the power of sale on the factor.

2. Moveables of great value cannot be sold by a factor without special powers from the owner. The question of degree, as regards the value, will be judged of in every case according to circumstances.

3. The power to purchase lands or moveables stands, as far as the constituent is concerned, on the same footing as the power to sell. Of course, a factor buying lands, though without power to bind his constituent, can effectually bind himself. Under this head may be classed the power of a factor to contract to acquire for his constituent a piece of ground in feu. In the case of Steuart,² the question was raised whether an averment of verbal authority to contract for a feu could competently be proved by parole.

4. Power to serve any one heir to a predecessor requires a special mandate.³

Under our former law, an agent and factor acting in virtue of a general factory was held to have sufficient power to make up his constituent's title to a lucrative succession by service; the constituent having written to the factor, desiring that he should be served heir in the estate, 'if not already set about;' and the service having been expedited, when the constituent was on military duty abroad.⁴ A mere general power would not now authorize the expediting of a service.

¹ Thomas, 4th July 1829, 7 Sh. 828.

³ Service of Heirs Act, 10 & 11 Vict. c. 47, s. 4.

² Steuart, 17th July 1857, 19 D. 1071.

⁴ Molle, 13th Dec. 1811, F. C.

But, where a lucrative succession can be taken up by precept, or writ of *clare constat*, or otherwise, without a service, a factor in circumstances, and with powers and instructions similar to those in Molle's case, could and ought to make up the title in his constituent's person.

Where special power is to be granted for the purpose of making up titles, it should be expressed comprehensively,—to make up the constituent's titles to all lands and other heritages to which he has succeeded, as heir of a particular predecessor; and to obtain him served heir accordingly; and to expedite all writs and deeds, and do all acts necessary for that purpose. The mere power to obtain the constituent entered as heir implies a power to do whatever may be requisite to support the petition for service, and the heir's title; and, therefore, to raise an action of reduction of an adverse service.¹ But where it is clear that such an action, or any other action in connexion with the titles, will have to be raised, special power to raise the action should be given to the factor.

Special powers are likewise required to enter the constituent's vassals, grant leases to his tenants, and to remove such tenants; likewise to compromise claims made by the constituent against others, or by others against him,² or to submit such claims to arbitration, or to postpone the security for a debt due to his constituent to securities for debts due to third parties.³

Power to borrow money on behalf of the constituent, and to bind him personally for repayment, or to dispoise his estate in security of payment, requires a special clause. When a power to sell or borrow money on the security of ships, or shares of ships, is to be exercised at any place out of the country where the port of registry is situated, the proper mode of proceeding will be to give the attorney a certificate of sale, or a certificate of mortgage, as authorized by the Merchant Shipping Act of 1854,⁴ already adverted to. In other cases where power to borrow is given, the clause of registration in the factory ought to bear a consent to the registration not only of the factory, but of all bonds and dispositions in security, or other deeds granted in the exercise of the power, for preservation and for execution, on six days' charge.

But, where a factor had special power to sell certain railway shares, and to execute all acts and deeds, thing and things, requisite with regard to the shares; and when calls had accumulated, for which the shares were in danger of forfeiture; the Court held the factor's powers sufficient to enable him to borrow money on the security of the shares, in order to pay the calls and preserve the shares.⁵

A factor requires special power in order to delegate his powers to a sub-factor.⁶ When the appointment of sub-factors is authorized, the

POWER TO
BORROW.

DELEGATION TO
SUB FACTOR.

¹ Gifford, 11th Feb. 1834, 12 Sh. 421.

² Hollinworth, 21st Jan. 1813, F. C.

³ Bridges, 22d Nov. 1831, 10 Sh. 43.

⁴ 17 & 18 Vict. c. 104, s. 76, *et seq.*

⁵ Thomson, 23d December 1842, 5 D. 379.

⁶ Dempster, 18th February 1836, 14 Sh. 521.

power ought to express whether the principal factor is to be liable for the actings and intromissions of his sub-factor.

In regard to these and other cases, where there ought to be special powers, it is important to keep in view that such powers are necessary, not only that the constituent may be bound, but also that the factor may be free of personal responsibility. It is also necessary, for this last purpose, that the transaction be done *factorio nomine*, and not in the name of the factor as if for himself. Thus, where a factor or agent, without special authority, and without communicating to his constituent, accepted bills in his own name for rent due to his constituent,—thus lending out his constituent's money in his own name,—the factor was held liable to make good the loss arising by the debtor's bankruptcy.¹ And where a law-agent, without special power, submitted his client's case to arbitration, and the client repudiated the submission, the agent was held personally liable to implement the decreet-arbitral.²

AMPLIFICATION
OF SPECIAL
POWERS.

I have mentioned, that a factor, who is to draw the rents of land or houses, has usually special power to that effect in his factory. And, though perhaps such power might authorize all legal proceedings necessary for securing and recovering the rents, it is advisable not only to give power to institute all requisite proceedings for these purposes, but specially to authorize application for warrants of sequestration and sale of tenant's crop and effects, when such proceedings are competent, and the factor shall think them necessary.

It is also of use, in the case of factories for the management of land-estates, to give special power to the factors to attend meetings of the heritors of parishes, and turnpike and statute-labour road meetings, on behalf of their constituents; and to act and vote at such meetings as the constituent himself could do if present.

It is further important, in framing a factory or commission which may subsist for some length of time, and under which it is intended to confer extensive powers, to frame the special clauses in a form so comprehensive as to embrace transactions of the various classes to which the power relates, whether arising out of the then existing circumstances of the party, or through other estate devolving upon him, or circumstances connected with such other estate. For example, if power is to be granted to make up the constituent's titles on the succession to his father, it would be advisable to authorize the factor to obtain him served heir, not only of his father, but also of any other of his predecessors to whom he had succeeded, or to any one to whom he might thereafter succeed. In examining the titles, it may turn out that part of the estate was not fully vested in the father, so that service to another predecessor is indispensable; and the succession to some other person may happen to devolve on the constituent when he is at a distance, and when it will be important that

¹ Arbuthnot & Co., 14th July 1739, M. 4065; as reversed, 7th February 1743, 1

Craigie & Stewart, 340; M'Donald, 18th Nov. 1807, Hume, 344.

² Livingston, 23d Feb. 1830, 8 Sh. 594.

the factor should have power to act at once, and without waiting for a new power. The same amplification may be found advisable as to several other of the special powers of a comprehensive factory or commission.

The factory may be terminated by the constituent at any time, either by a formal recal, or by granting a factory with the like powers, or for the same purposes, to another party, which will imply and operate revocation. And, even while the factory subsists, the constituent has in himself full power to act; the factory not being a divestiture in any sense. And, if the constituent, by himself, transacts a claim which he had given his factor express power to settle for him, not only will the constituent's act be effectual (assuming always that the factor has not already done anything to create a mid-impediment), but the constituent's acting for himself will terminate the factory, in so far as applicable to the claim so transacted. In the case of Walker,¹ the factor's right to establish a claim against his constituent for outlay and trouble, arising whilst he was acting in his factorial capacity, was reserved. But, where third parties are interested, the act or deed of the constituent will not supersede or render ineffectual the preceding act or deed of the factor actually done in the *bond fide* exercise of the powers given by the factory. This was strongly illustrated in a case where the factor had power to present ministers to vacant churches, of which his constituent was patron. In virtue of such power, the factor issued a presentation in favour of a qualified party. The constituent, who was on the Continent at the time, granted a presentation to another party equally qualified. The constituent's presentation was dated two days after that by the factor, but both were laid before the presbytery at the same time; and for the purpose of prosecuting the settlement of the new minister, and of filling up the vacancy in the parish, the one was in as good time as the other. But the Court of Session and House of Lords preferred the factor's presentee, because he had obtained his presentation two days before the interference of the constituent.²

The constituent's inherent power to recal a factory is strongly shown in the case of Heddrington.³ In that case, a factory was granted by two of the three partners in a mineral lease to the third partner, to subsist during the lease, or for his life. He proved unfit for his duties; whereupon his copartners recalled his factory, and named a new factor, intimating in a public manner that they had done so. The Court found that the factory could be revoked for just causes, and that the publication of the new factory was sufficient for that purpose. But where a father had named tutors to his children, and at the same time had appointed a factor to act in the management of the estate, which devolved upon his eldest son and heir, during such heir's pupillarity and minority, the Court held

¹ Walker, 13th Dec. 1837, 16 Sh. 217.

² Heddrington, 14th July 1724, M.

³ Keith, 30th March 1778, 2 Paton's App. 447.

the factory a qualification of the tutor, and would not sanction a recalculation thereof by the tutors, unless malversation was alleged against the factor.¹ An arrangement of that nature, it should be observed, is almost unknown, and is very objectionable. Parties holding the difficult and responsible office of tutors should have full control over all the agents employed in managing the pupil's estate.

BANKRUPTCY.

Factories also fall by the bankruptcy of the constituent. But, where a mercantile factor had lawfully incurred liabilities for his constituent, the Court held him entitled, after his constituent's bankruptcy, to sell goods previously consigned to him for sale, in order to reimburse himself of his advances; being of opinion that his commission to sell such consigned goods could only be revoked by instant repayment of advances, or relief of liabilities.²

INCAPACITY.

Factories also fall by the supervening incapacity of the constituent. But, apparently, the law would protect third parties *bona fide* contracting with the factor, in ignorance of the incapacity; though that point is not settled.³

**DEATH OF CON-
STITUENT.**

As a general rule, the powers of factors cease by the death of their constituents; or if the constituents are a body of trustees, tutors, or others acting jointly, and whose office ceases by the death of any one of their number, the factory likewise will fall by the death of any one of them.⁴ The factor, however, is entitled to act until he receives authentic accounts of his constituent's death.⁵ And a special protection is given by the Merchant Shipping Act, sect. 76, to the acts done by a person empowered by certificate of sale or mortgage, in the form authorized by that Act. But if, as in Campbell's case, rumours of the constituent's death have been current, any actings should be of the most limited kind till the real truth be known.

**RESIGNATION
OF FACTOR.**

The factory may be resigned by the factor; but if he is a sole factor, or if his resignation will terminate the factory, he must be careful, before ceasing to act, that his constituent has proper notice of his intention, and opportunity to make such arrangements as the circumstances may require; otherwise he may be exposed to a claim for damages, arising from a precipitate resignation.⁶ One of two or more factors, though entitled to act separately, should also take care not to embarrass his co-factors by resignation, without reasonable notice or clear and sufficient occasion.

The factory falls likewise by the incapacity of the factor, or by his death; or, if there are two or more factors who require to act jointly, by the resignation, incapacity, or death of any one; and, if there is a *sine quo non*, the factory will fall by his resignation, incapacity, or death. Practically, factories will in many cases fall by the bankruptcy of the factor, though that does not appear to be always a necessary consequence.

¹ Walkinshaw, 9th December 1743, M. 4049.

² Broughton, 17th Dec. 1814, F. C.

³ Pollok, 10th Dec. 1811, F. C.

⁴ Stewart, 29th Feb. 1832, 10 Sh. 392;

as reversed, 7th April 1834, 7 Wil. & Sh. 211.

⁵ Campbell, 7th Dec. 1826, 5 Sh. 86; affirmed 1st May 1829, 3 Wil. & Sh. 384.

⁶ Menzies, p. 474.

It has been held that the office of factor has been presumed to be gratuitous when there is no mention of remuneration in the factory.¹ REMUNERATION
OF FACTOR. When an allowance is to be made, but the rate or amount is not fixed, and parties cannot agree on it, the Court will settle it; and their decision will depend on the circumstances of each case. A testamentary trustee, however, acting as factor for himself and his co-trustees, is not entitled to any salary or allowance, unless provision for his remuneration is made in the trust-deed and factory.²

In accounting for money received, factors who have right to salary or allowances are entitled to retain the amount thereof, as also their outlay in the factory-business. But a factor who pays debts due by his constituent, without his constituent's authority, is not entitled to retain such debts out of sums coming to him as factor. He is just in the position of an ordinary assignee to the debt paid.³ For securing to him his proper position as an assignee, he should obtain an assignation of the debt to himself, not a discharge to the debtor, his constituent.

The factor, by accepting his office, becomes liable to fulfil its duties; LIABILITY OF
FACTOR. but the nature of his liability varies, according as he is to be remunerated or not. If his office is gratuitous, the general rule is that he is liable for intromissions only, and not for omission to do exact diligence. If, on the other hand, he is to be paid for his trouble, he is liable for loss arising through neglect of duty. In the case of Goldie,⁴ a factor, specially authorized to expedite confirmation in favour of his constituent as executor of a person deceased, for vesting in his constituent the deceased's personal estate, neglected to do so. His constituent died, and, in consequence of the factor's neglect to expedite the confirmation, the personal estate in question did not become vested in him, and did not fall under his will. His widow suffered damage in consequence, which the factor was held bound to make up. As regards personal estate, the same thing could not now happen, owing to a change in the law; but the case might apparently occur in reference to heritable estate, should any one be able to instruct damage through a factor's neglect to make up his constituent's title, when specially empowered and instructed to do so.

The factory, however, may declare the factor exempt from liability for neglect, and bind him only to account for his actual intromissions, even if he is to have remuneration; and in a case where the factory was so framed, and where it was alleged, but not proved, that loss arose in consequence of delay on the factor's part, the Court refused to hold the factor liable.⁵ There were various circumstances, however, in this case, favourable to the defence of the factor against the claim of liability; and the effect which the Court would allow to any clause of the above nature would depend on the circumstances of each case. There may be such neglect as to subject a factor, even with such a clause of immunity,

¹ Orbiston, 17th Feb. 1736, M. 4063.

² Wellwood's Trustees, 17th Dec. 1856, 19 D. 187.

³ Douglas, 24th July 1678, M. 2625.

⁴ Goldie, 4th Jan. 1757, M. 3527.

⁵ Stewart, 14th Dec. 1830, 9 Sh. 178.

in liability for loss through his carelessness. Where, however, the factor gave notice to his constituent that he was not doing diligence, and stated his reasons, and the constituent gave no orders to do diligence, but left it to the discretion of the factor to do diligence or not, it was found that the factor was not to be regarded as having been negligent, merely because the debtors eventually proved insolvent.¹ The case of *M'Caul* points out the practical course to be followed when there is opportunity. Indeed factors ought, as much as possible, to obtain and follow instructions, and use their factory as a means of carrying out instructions, not of independent action.

CLAUSE OF
INDEMNITY
TO PARTIES
DEALING WITH
FACTOR.

The factory ought to contain a clause of indemnity to third parties, relieving them of all concern with the factor's obligations to his constituent; and specially when power to sell lands, or to borrow money, is given, care should be taken to free the purchaser or lender of all occasion to inquire whether the sale or loan was truly necessary, or in what way the price or money lent was applied. These powers should, in their terms, be committed wholly to the discretion of the factor, leaving the necessity for their exercise, and the disposal of the proceeds, to be settled between the constituent and him. But powers of such extent are unusual.

FACTORY
SHOULD BE
RECORDED FOR
PRESERVATION.

A factory and commission, when acted upon, ought to be recorded for preservation. It is then an essential part of a voucher, or of the title to an estate, or to a lease, or as the case may be. And, as it cannot be delivered by the factor to any of the parties with whom he transacts, its registration is necessary for the security of those who transact with the factor, and also for the protection of the factor, as showing that he had the powers which he exercised. Of course the constituent or factor is bound to make the factory, or a probative extract of it, forthcoming to all who have transacted with the factor, on every necessary occasion.

¹ *M'Caul*, 8th Feb. 1740, M. 3524.

TITLE VII.

BILLS AND PROMISSORY-NOTES.¹

CHAPTER I.

WE are now, in further pursuance of the plan of this course, to enter on the consideration of the large and important subject of Bills and Promissory-Notes. These writings are so peculiar in their forms, solemnities of execution, modes of transimission, and privileges, as to form a distinct and separate class of instruments. Being strictly personal in all respects, they fall under the first leading division of the course; and I have thought it convenient to consider them immediately before the subject of Personal Diligence, of which they are now, more than any other writings, the foundation and warrants.

Mr. Thomson, in the preface to his valuable work on the Law of Bills of Exchange, informs us that the history of these documents is involved in great obscurity, but that in all those nations among which they have come into complete effect their progress has followed the course of commerce.

Professor Bell in his Commentaries² says, 'The only circumstance in their history which is of much consequence to point out is, that as a branch of practical jurisprudence, or as a circulating medium in trade, bills of exchange were unknown to the Romans; that without their aid foreign trade cannot proceed to any great extent; and that this affords one of the best proofs of the remarkable difference between the state of trade in ancient and modern times.'

You will find some other interesting particulars, both as to their origin and history, in Blackstone's Commentaries³ and Professor Menzies' Lectures.⁴

¹ The books to be referred to on this subject are,—Bell's Commentaries; Thomson on Bills of Exchange; Chitty; and Byles.

Our institutional writers are now a good deal out of date on this great branch; and

we may rely on finding, in the writers above referred to, all that is of value contained in the older authorities.

² Bell's Comm. i. 386.

³ Blackstone, ii. 611.

⁴ Menzies, p. 325.

But, whatever be their origin, they are now, from their extensive use, the various purposes to which they can be applied, and the patrimonial interests connected with them, of great and increasing importance, all over the world. In regard to the amount of the money actually contained in them, it is difficult to form a correct estimate, more especially as the uniform duty of one penny is so largely employed for bills viewed as a circulating medium, whatever sum may be contained in the bill. But it is thought that the value of bills and promissory-notes used in one year, in Great Britain alone, amounts to several hundred millions of pounds sterling.

Viewed as the *media* for transmitting, and in a certain sense securing the punctual payment of, money of such amount, they must be objects of interest to every one in a mercantile community. And it is of special importance that Conveyancers should be familiar with what is necessary for conferring or preserving their privileges, as we are so often called on for advice and direction on that subject. We therefore require to study the laws affecting their structure, transmission, negotiation, and extinction, and the general principles on which they become the warrants of summary diligence.

**DEFINITION OF
A BILL.**

A bill of exchange is a written order, by one party called the drawer, to another party called the drawee, ordering the latter, on demand, or at sight, or on a particular day, or within a specified period after sight or after date, to pay to the former, or to a third party styled the payee, or his order, a specific sum of money. The bill, when so drawn, is presented to the drawee, who, if he undertakes to pay in obedience to the order, signs his name upon the bill, sometimes prefixing the word 'accepted;' but this is not required. His simple subscription is enough to bind him. After he has signed, he is styled the acceptor, and, the bill being delivered to the payee (which may be either before or after acceptance), an obligation to pay the sum expressed in the bill, when thereby due, is constituted in favour of the payee on the part of the drawer, whether the acceptor has signed or not, and also on the part of the acceptor, after he has signed, jointly and severally.

**OF A PROMIS-
SORY-NOTE.**

A promissory-note is a writing by which the granter, or maker, promises on demand, or within a specified period after date, to pay to the grantee or payee a specific sum of money; and on the delivery of the note, signed by the granter, to the payee, the obligation on the granter to pay accordingly is complete.

The original purpose for which bills were introduced was the transmission of money from one country to another; as Erskine says, to make payment in distant places easy and safe. For example, A., residing in Edinburgh, has £100 due to him by B., residing in Paris, and he is debtor in the like sum to C., also residing in Paris. Without the use of bills of exchange, B. would have to send to A. £100 from Paris to Edinburgh,—whilst, on the other hand, A. would have to send to C. the like sum from Edinburgh to Paris; transmissions which would

involve both risk and expense. The bill of exchange obviates these evils. In the case supposed, A., who has £100 due to him in Paris, and who owes the like sum also in Paris, draws a bill on his debtor there, B., ordering him to pay the £100 to C. This bill is sent to the payee, C., who presents it to B. for acceptance, and in due time for payment; whereupon, through the medium of the bill, a settlement is effected between A., B., and C., by one simple transaction, at Paris, without the actual transmission of any sum of money from one place to another. There are three parties to a bill such as that above described, which is the proper mercantile instrument; and, having reference to a transaction between our own and another country, it is called a foreign bill. But, after bills had been in use for some time, in connection with foreign transactions, the great convenience and advantage they afforded, as the means of transmitting money and settling accounts, led to their introduction for like purposes, in reference to transactions between parties all resident within this kingdom; in which case the bills employed, as contradistinguished from foreign, are called inland bills. INLAND BILLS. They are found in use for such purposes at an early period; and, considering the defective means of internal communication, and the dangers attending the transmission of money by common highways, even when such existed, it must often have been more important to adopt that mode of settling debts due to and by parties resident in distant places of this country, than when the one was resident here and the other abroad. Some ambiguity having arisen as to what constitutes an inland bill, the Mercantile Law Amendment Act of 1856¹ gives the definition as—‘Every bill of exchange drawn in any part of the United Kingdom of Great Britain and Ireland, the Islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them, being part of the dominions of her Majesty, and made payable in, or drawn upon, any person resident in any part of the said United Kingdom or Islands.’

Promissory-notes were adopted next after inland bills. These are, strictly speaking, appropriate to the purpose of constituting or admitting a debt or balance arising on a mutual account, or settling the price of a commodity bought on credit. But we shall see that, the debt or balance being so constituted, the promissory-note can, by being indorsed, be used for the purpose of remittance just like a bill; and, practically, a promissory-note is, for mercantile purposes, on the same footing with a bill. Both instruments, moreover, furnish so easy a mode of constituting a transmissible obligation, that they have gradually come to be used in transactions of very considerable variety, and by no means necessarily connected with trade. They are also in ordinary and universal use for trade purposes, whether the parties reside at a distance from each other or not.

In proceeding with this subject, I propose, first, to consider what is FORM OF BILLS
AND NOTES. necessary in respect to form in the bill and promissory-note. No par-

¹ 19 & 20 Vict. c. 60, s. 12.

ticular words are absolutely necessary in point of form. Mr. Thomson says, 'It is enough if their purpose be clearly expressed.' Professor Bell's language, on that subject, is more explicit. He says, provided the words 'amount to an undertaking or promise, absolutely to pay a precise sum of money, at a definite time, it is a good bill or note.' The regular and usual forms of bills and promissory-notes will be seen from the following examples:—

1. *Foreign Bill.*

£ (*sum in figures*).

(*Place of drawing,
and date in figures.*)

Ninety days after sight of this our first of exchange (second or third, of same tenor and contents, being unpaid), pay to E. F., or his order, within the office of the Colonial Bank in Calcutta, the sum of (*here the sum will be stated in words*), for value received.

To Messrs. C. D. & Co.,	(Signed)	A. B. & Co.
Merchants,		(<i>Date in figures</i>)
Calcutta.	(Signed)	Accepted.
		C. D. & Co.

The parties to a foreign bill being of different kingdoms, the rights and questions arising from such documents are regulated by the principles of Mercantile Law, and the Municipal Law is applied only where it interferes by positive Statute, as is the case in Scotland with regard to prescription, execution, and the stamp.

2. *Inland Bill.*

£ (*sum in figures*).

(*Place of drawing,
and date in figures.*)

Three months after date, pay to us, or our order, within the office of the Bank of Scotland in Glasgow, the sum of (*here the sum will be stated in words*), for value received.

To Messrs. C. D. & Co.	(Signed)	A. B. & Co.
Merchants,		C. D. & Co.
Glasgow.		

In this case, as you will observe, the acceptors simply sign the bill; whereas, in the case of the foreign bill, they prefix a date to their subscription. The reason of the difference is, that the foreign bill, of which an example has been given like foreign bills in general, is made payable at a certain period after sight, and the date, written at acceptance, marks the date from which the period named is to run. The date so written is therefore adhibited, in order to show, on the face of the bill, on what day it is payable. But inland bills are usually made payable with reference to the date at which they are drawn; and, in such cases, the actual date of the acceptance is not adhibited, the document being in all respects complete without it.

The following is the ordinary form of the Promissory-Note.

£ (*sum in figures*). (*Place of granting,
and date in figures.*)

Three months after date, we promise to pay to C. D. & Company, or order, within the office of the Bank of Scotland in Glasgow, the sum of (*here the sum is stated in words*), for value.

(*Signed*) A. B. & Co.

The leading distinction between foreign and inland bills, as above and usually framed, is that the former, being drawn in triplicate,—that is, in sets, or parts of three,—all applicable to one and the same sum and transaction, are each drawn and accepted subject to the condition that no other of the set shall have been paid. The debt is to be paid by means of a bill, and,—to prevent inconvenience and delay in consequence of the loss of the bill, in passing from one country to another, if only one were granted,—the plan of drawing in sets has been resorted to; and it is usual to transmit the several bills of the set by different ships or posts. In that way, the risk alluded to is obviated. But on the other hand, though there are three bills, there is only one debt; and it is necessary to provide against more than once and single payment of the amount. This is done by the insertion of the condition we are now considering, agreeably to which, the holder of the bill or part first presented,—whether the 1st, 2d, or 3d of the set,—is alone entitled to payment. The others, even if presented afterwards, constitute no claim upon the drawee; their own express terms rendering them, in the case supposed, nugatory. Special caution, therefore, is necessary in dealing with such bills; and whilst they are current it is desirable, if possible, to obtain the indorsation and delivery of the whole of the set. And such indorsation and delivery are now absolutely necessary in the case of bills drawn and issued within the United Kingdom, payable out of the kingdom, and purporting to be drawn in a set; or as to such bills when transferred or negotiated, or when taken or received in the United Kingdom in payment, or as a security, or by purchase, or otherwise. In these cases, the whole numbers of the set must be drawn and issued, transferred and delivered, duly stamped.¹ The reason of this provision is, that the rate of the stamp-duty in such cases is modified, and, if the whole parts were not duly stamped, the revenue might be defrauded.

The foreign bill, as before exemplified, has three parties, which is its usual form. There may, in like manner, be three parties to the inland bill, but I believe it is more usual to find inland bills with only two parties, and I have given the example accordingly. Such bills are not drawn in sets,—nor are promissory-notes so granted, there being no occasion, in home transactions, for more than one of each of these documents.

The example above given makes the foreign bill payable so many days after sight, and the inland bill and promissory-note so many months after date; these being the usual forms in the case of such instruments

¹ 17 & 18 Vict. c. 83, s. 6.

respectively. But, either as to inland or foreign bills, or promissory-notes, the payment may be made so many days, or months, or years, after date, or on a day certain, or after sight, or on demand, or it may be at usance, double or treble, or half usance,—that is, the period usually allowed for payment of bills or notes between two countries. For instance, between London and France, the period is thirty days; and a draft from London on Paris, payable at usance, is equivalent to a draft payable thirty days after date. This will be regulated according to agreement or circumstances. Of course, in the case of a foreign bill, the time after date, or the fixed day of payment, ought to be such as that the holder can, in due time, present the bill for acceptance or payment.

**AUTHENTICA-
TION.**

I will now consider the subject of the Authentication of Bills and Notes. As regards authentication, bills and promissory-notes have the privileges accorded by law to mercantile instruments, of which they are themselves the most important class. Without these privileges they would be unworkable. With reference to foreign trade, it would be impossible to make foreigners generally acquainted with the solemnities applicable to the execution of deeds in all countries other than their own. And, even with reference to inland trade, the solemnities of deeds would prove an intolerable incumbrance upon documents of such frequent occurrence, and requiring such despatch as bills and notes. Nor has the dispensing with solemnities been productive of bad consequences. The great object of solemnities is to secure genuine documents, deliberately granted; and, considering the immense number of bills in circulation, we are entitled to say, with regard to them, that forgery and circumvention are very rare occurrences.

**SIGNED BY
NOTARIES.**

Bills and notes must be in writing; and by the Mercantile Law Amendment Act, sect. 11, the acceptance of a bill, whether inland or foreign, must be written upon the bill, or one of its parts, if there are more than one. But bills and notes do not require to be holograph of any of the parties. They can be written by any person, whether a party to the instrument or not; and, when the parties can write, will be authenticated by their simple subscription. When any of the parties cannot write, the subscription of two notaries for him, in presence of four witnesses, appears to be required, in order to give the document all the privileges of a bill or note subscribed by the party himself.¹ But a bill will be sustained as a document of debt, though not as a warrant for summary diligence, if subscribed by only one notary, duly authorized by the party, in presence of two witnesses.² The forms of proceeding, in order to authorize the notaries or notary to execute the bill or note on behalf of the party—with the notary's attestation or docquet—are the same as in the case of an ordinary deed. The bill, however, will not stand, even as a document of debt, though subscribed by one or by two

¹ Thomson, 554; Dickson on Evidence, 412.

² Thomson, 45; Dinwoodie, 28th June 1737, M. 1419.

notaries, duly authorized, unless there be two subscribing witnesses.¹ The witnesses also (when a notary or notaries are employed) attest, as in the case of ordinary deeds, the whole facts, as well as the signature of the notary or notaries. When there are two notaries, they must act jointly and not separately, and must subscribe. They ought also to be designed in the bill or note. In cases where only one notary has subscribed, and where the party does not admit having given authority to subscribe for him, it is uncertain whether it is necessary, in order to allow the holder to found on the bill as a document of debt, that the witnesses be described in the bill, or whether it is not enough for such purpose that they were present and have subscribed; and, supposing it necessary to describe them, it is doubtful whether a description in the notary's docquet is sufficient, and whether their description ought not to be inserted in the bill. The prudent course, in practice, plainly is to describe them both in the bill and in the docquet.

Subscription by initials is sufficient to bind the party, but not to the effect of authorizing summary diligence. A bill so subscribed does not prove its own authenticity. The separate proof, after adverted to, is requisite, in addition to the subscription of the initials, to give it force. In the case of the subscription of an ordinary deed by initials, there must be subscribing witnesses, with a regular testing-clause, and it must be proved that the party was in use so to subscribe; supposing always that the subscription to be supported is not a solitary instance of the act of subscription being performed by the party. In the case of bills and notes so subscribed, neither witnesses to the actual subscription, nor any of the other statutory solemnities applicable to ordinary deeds, appear to be essential. It is enough that the subscription be admitted, or reasonable evidence adduced that it was adhibited by the party; and also (if the case is not that of a solitary act of subscription) that his usual mode of subscription was by initials.² When it could not be proved that the party did actually subscribe her initials in an indorsement (which, as regards authentication, is on the same footing with acceptance), the alleged indorsement was not sustained.³ The subscription by initials, moreover, must be without assistance, in the case of bills, equally as in that of ordinary deeds.⁴ There can be no summary diligence, however, on a bill or note so subscribed, because the document does not of itself prove the genuineness of the subscription. Extrinsic evidence is necessary to establish that fact. In all other respects, such bills or notes appear to be on the same footing with bills or notes authenticated in the usual manner.⁵

Signature by a mark, though not admitted at all in the case of a deed, was sanctioned, by a consistent train of decisions, as a mode of authen-

¹ Fyfe, 23d June 1762, 5 Br. Sup. 887; Buchanan, 27th June 1765, M. 1451 & 16,985.

² Wilson, 2d Feb. 1688, M. 12,493; Thomson, July 1729, M. 16,810.

³ M'Ilwraith, 23d June 1785, M. 16,820.

⁴ Pringle, 1735, M. 16,810.

⁵ Munro, 14th Nov. 1820, Hume, 81.

ticating a bill or note. As the Mercantile Law Amendment Act requires (sect. 11) that the acceptance of a bill shall be in writing, it seems very doubtful whether, subsequently to the operation of that Act, acceptance by means of a mark only can be considered sufficient, as the mere signing of the usual mark X, or of any other mere mark (not being intended for the signer's initials), can hardly be allowed to be writing. That point apparently has not been tried, and in the meantime it would be prudent to avoid admitting a mere mark to be writing. As to drawing bills, making promissory-notes, and indorsing either bills or promissory-notes by means of a mere mark, the older law is not altered. But it is necessary, in order to support the bill or note, when so signed—(1.) as in the case of subscription by initials, that the mark signed be either admitted or proved to be genuine; and (2.) to establish that it is the party's usual practice so to sign such instruments, assuming that there is room for proof of practice.¹ In one case, where all the co-obligants in a bill were dead, and no witnesses could be adduced who saw the signatures exhibited, it was held competent, by facts and circumstances, to prove the genuineness of the signature of one of the co-obligants, which was made by a mark.² It cannot, therefore, be said that under all circumstances witnesses to the signing of the mark are absolutely required; but, practically, the subscription of witnesses would always be of great assistance in the proof of signature by mark. Bills or notes so signed, however, are not the warrants of summary diligence, for the same reason as that stated in regard to bills or notes authenticated by the party's initials.³ Subscription in pencil has been found sufficient.⁴

The signature of the parties ought to be on the face of the instrument. But in the case of the renewal of a bill, where one of the drawees (being an acceptor in the original bill) wrote his name on the back of the new bill, he was held to have accepted.⁵ And, in the case of a promissory-note, one who wrote his name on the back, not being payee, and who, therefore, could not have so written as indorser, was held to be liable to the holder of the note equally as if he had signed on the face of the note along with the maker of it.⁶ The signature of the party must be on the instrument, but, being there, it was in these cases held not indispensable that it should be strictly in the proper place. But though bills require to be signed by the parties, in order to their being complete instruments, a bill accepted by the drawee, but blank in the name of the drawer, is effectual to any one to whom it is delivered for value, and such party can himself sign as drawer.⁷ Even an acceptance, altogether blank when signed,—that is, the acceptance of a skeleton-bill,—a paper im-

BLANK ACCEPT-
ANCE.

¹ Ker, 28th January 1803, Hume, 50; Cockburn, 8th Dec. 1815, F. C.; Kennedy, 25th May 1816, F. C.

² Craigie, 23d March 1832, 10 S. 510.

³ Stewart, 11th July 1815, F. C.; M^cIntosh, 9th Dec. 1828, 7 Sh. 155; and Craigie's case, above cited.

⁴ English case of Geary, reported by Thomson, p. 8.

⁵ Watters, 7th March 1818, F. C.

⁶ Don, 26th May 1812, F. C.

⁷ Dishar, 16th November 1810, Hume, 64.

pressed with a bill-stamp, and wholly blank, except that it is signed by the acceptor, will be effectual to an onerous *bond fide* holder, for any sum not exceeding that which the stamp will cover, and the holder may sign his own name as drawer.¹ The principle on which a skeleton-bill is supported is, that the party who subscribes it is presumed to deliver it to the holder, with a mandate to write on the paper a bill of as large amount as the stamp will cover; but that is only a presumption, which, in a question with the original holder, or with an indorsee acquiring the bill when overdue, may be overcome by proof that the mandate actually given to him authorized only a bill for a smaller sum.²

The bill may be signed by the drawer even after the acceptor's death.³ And, though the drawer shall become bankrupt, without having signed, the bill will be good to the trustee on his sequestrated estate as a ground of action against the acceptor.⁴ A bill will, in like manner, be good as a ground of action against the acceptor, even if the drawer shall have died without having signed. In such case the drawer's executors, after completing their title by confirmation, can sign as drawers.⁵ It has further been decided, that when the drawer has written the bill in his own hand, naming himself therein as the payee, but has died without adhibiting his subscription, his executor can make use of the bill, as (along with his confirmation) a ground of summary diligence in his own name against the acceptor.⁶ The case of *M'Bean*, however, and the point therein disposed of, require special consideration. There would have been no difficulty in allowing an ordinary action upon the bill,—the question was whether the bill was a warrant for summary diligence,—and it is said in the report that, when the bill was stated from the bar to be of the handwriting of the intended drawer, the Court had no difficulty about sustaining the charge. 'The Lord President said that his name, written with his own hand, *in gremio* of the bill, was as good as his signature at the bottom.' But I have to notice, in contrast with that decision, the finding of the Court in an anonymous case,⁷ where a bill contained the name of the drawer, who was also payee, in the body of the writ, but had not his subscription. The Court thought this not a good warrant of summary diligence; for, though it might be true that the bill was holograph, in which case the drawer's name, written in the body of the bill, was equal to a subscription at the foot of it, yet still letters of horning (the writ of summary diligence then in use) were not allowable; for the question at once arises, whether the bill is holograph or not; and, if a proof of holograph is required to support the bill, that is reason enough

DRAWER'S SUB-
SCRIPTION.

¹ Erskine, iii. 2. 28, note 69; 1 Bell's Comm. 390, note 5, and cases there referred to; see also Grassick, 8th July 1846, 8 D. 1073.

² Anderson, 21st November 1817, 20 D. 74.

³ Innes, 13th Jan. 1802, Hume, 47.

⁴ Ogilvie, 28th June 1804, M. App., Bill of Exchange, No. 17.

⁵ Fair, 24th June 1801, Hume, 46; *M'Donald's Trustees*, 13th June 1817, F. C.

⁶ *M'Bean*, 22d Nov. 1806, Hume, 57.

⁷ *A. v. B.*, July 1750, M. 1442; and *Elchies*, *voce* Bill, No. 47.

for refusing such letters, which can only be given on a writ *ex facie* valid. The anonymous case, I apprehend, states the correct principle. You cannot have summary diligence on a writ which is not in itself probative, and independent of extrinsic proof of its validity. And I cannot recommend the raising of diligence on a bill unsigned by the drawer, even though he is payee and writer. In M'Bean's case, it appears not to have been disputed that the bill was holograph. But suspenders will not, in general, make any admission as to that point. And the safe course is to raise an ordinary action, and not diligence.¹ Another point in M'Bean's case seems to require notice. He raised his diligence before his title as executor was completed by confirmation. But diligence, which is an *actus legitimus*, possibly involving most serious consequences, ought never to be raised on an imperfect title.

BILLS SIGNED
BY PROCURA-
TION.

Hitherto, we have been considering the case of bills and notes subscribed by the parties themselves, or by notaries authorized in ordinary form, or signed by a mark. But bills and notes can be subscribed for the proper or principal parties, and so as to constitute valid documents as against such parties, by persons holding special powers or procuratories from the parties, authorizing the signing of bills and notes on their behalf. The person exercising such power usually writes on the bill or note, 'For A. B.,' or '*p. pro.* of A. B.,' and then subjoins his own subscription. The power is usually given by a probative writing; but it may be instructed and established, by facts and circumstances, without a formal deed.² In the case of companies registered under the Joint-Stock Companies Act of 1856, notes or bills might be made, accepted, or indorsed, on behalf of any such company, by any person acting under the express or implied authority of the company.³ And by the Companies Act 1862, sect. 47, promissory-notes or bills are to be deemed to have been made, accepted, or indorsed on behalf of any company under that Act, if made, accepted, or indorsed in the name of the company, or by or on behalf or on account of the company, by any person acting under the authority of the company.

Whether bills or notes signed by procuration, or executed in conformity with the provisions of the above Acts, are good grounds of summary diligence, appears not to be authoritatively settled. If the fact of the power or authority having been given is not to be held as proved on the face of the bill,—if such fact is to be held as requiring extrinsic proof, then, on principle, summary diligence should not be competent, unless, perhaps, when the signature *p. pro.* is adhibited on behalf of the drawer and holder. Such diligence was indeed sus-

¹ On this point, I refer to Lord Ivory's Note, No. 69, p. 624, of his edition of Erskine, observing only that it was written before Baron Hume's report of M'Bean's case was published. I refer also to Professor Menzies' Lectures, pp. 339, 340, where M'Bean's case is quoted; and it is laid down distinctly, that a bill, even when

written by the drawer and payee, is not a ground of summary diligence, if unsigned by the drawer.

² Lord Eldon, in the case of Davidson, 4th July 1815, 3 Dow's App. 218; 1 Bell's Com. 400, note 1; Murray, 28th Nov. 1827, 6 Sh. 147.

³ 19 & 20 Vict. c. 47, s. 43.

tained upon an acceptance *p. pro.* in the case of Turnbull,¹ but the circumstances were of a special nature. The acceptance was for a company, by their manager, who unquestionably transacted their whole business; and (as the rubric of the report says) was a partner. The acceptance, moreover, was for goods actually furnished to the company, and suitable to its business. The question was shortly afterwards raised, in a case where the signature *p. pro.* was on behalf of the drawer and holder.² The diligence was sustained, although the signature *p. pro.* was only by a mark. But the decision was founded on admissions by the suspender, and the case was special. The charger's counsel, the late Mr. Robert Jameson, then one of the leaders of the bar, pleading in favour of the diligence, suggested a distinction, as to the point under consideration, between the cases where the signature *p. pro.* is on behalf of the drawer and holder, and where it is on behalf of the acceptor or indorser; maintaining that, in the case of the drawer and holder, the proof of authority to subscribe *p. pro.* is a matter of comparative indifference. He said,—‘The authorities quoted,’ against the right to raise summary diligence, ‘regard the signature of acceptors, in relation to whom it must be proved that the mark is theirs, or the subscription by procurators is for them, and consequently summary diligence cannot be done against them. The same rule applies to indorsations. As to the drawer, his name may be filled up at any time. The charger in this case (that is, the person signing *p. pro.*) is confessedly the original drawer, and his title to the bill is not denied. Where, then, was the incompetency of his proceeding with diligence? The sole question is, was this bill the property of the charger? And, this being admitted, he would be entitled to proceed with diligence,’ etc., etc. The distinction here suggested is clearly worthy of attentive consideration.

In regard to this matter of signing for another, and likewise as to signing bills or notes in a particular character, there are opposite points to be kept in view and provided for, or guarded against. On the one hand, if parties are dealing on the credit of the principal, it should be seen that the procurator has the power he acts on, and actually signs so as legally to bind his constituent. And, on the other hand, if the party is acting only as an agent, he must take care to frame the bill, or to subjoin his subscription, in such a way as to bind his constituent only, or to bind himself only in an official capacity, not to bind himself personally and individually. Thus, if the agent is to bind his principal, he must subscribe the bill expressly as agent or procurator. The bill itself must show that he subscribes only as acting for another. And if, in place of this, he subscribes merely his own name, the principal (whose name is not on the bill) will not be liable under the bill.³ On the other hand, a party who has signed a bill in his individual capacity cannot afterwards

¹ Turnbull, 26th Feb. 1822, 1 Sh. 353.

² Mackintosh, 9th Dec. 1828, 7 Sh. 155.

³ Telford, 26th May 1824, 2 Sh. App. 219; reversing the judgment of the Court of Session, 5th Feb. 1822, 1 Sh. 290.

plead, in bar of personal liability, that he acted only as trustee.¹ Nor does subscription of a bill 'as cautioner,' which was at one time held to annul a bill, qualify the liability of the party so subscribing to an onerous holder. The cautioner is directly liable to such holder as a proper debtor, exactly as if the word 'cautioner' had not been used. The use of that word regulates his liability only in a question with his principal, against whom he has right of relief, as matter of course.² And, though a bill, accepted by one who is a factor for another, bears to be for value given to his constituent; and, in the address, the designation given to him is factor on the estate of his constituent; yet, if signed by him in his individual name, without words to show that he binds himself only as factor, or signs *p. pro.* of his constituent, he will be personally liable.³ In Chiene's case, the opinions of the whole Court were taken; and the principles of liability will be found very clearly and succinctly stated in the opinion of the consulted Judges drawn up by Lord Ivory. The parties to bills and promissory-notes do not require to be designed in the instrument. The acceptor generally is so in the address to him, and the payee sometimes is; the other parties hardly ever so.

SUBJECT-
MATTER OF
BILLS MUST BE
MONEY.

The subject-matter of bills and promissory-notes must be a precise sum of money.⁴ In England,—the law of which as to bills and promissory-notes is, generally, though by no means invariably, the rule in Scotland,—so strictly has that principle been enforced, that promissory-notes made payable in 'money, or Bank of England notes,' were found null.⁵ It was tried in an English case noticed by Mr. Thomson, whether a promissory-note for so many 'pound,' instead of 'pounds,' was good. The note was sustained, as was also in the Court of Session a bill which bore in figures, at the usual and proper place, to be for £22, 6s. 8d., but stated the amount in the body of the bill as 'Twenty-two' (in words) '6s. 8d.' (in figures), omitting the word 'pounds' after 'twenty-two.' In this case, it was not denied that the debt was due; and the bill was sustained as a ground of summary diligence.⁶ Similar decisions had been given in two English cases, cited in Gordon's case, which the Court of Session held binding on them. But they likewise expressed an opinion that the meaning of the document before them was clear, and that no extrinsic evidence was required to support or explain it.

The sum of money must be precisely fixed. A document granted for payment of 10s. *per diem* to the payee, till he should be provided with a company in the army, was not allowed the privileges of a bill.⁷

THERE MUST BE
AN ORDER OR
PROMISE TO
PAY.

I next notice that the bill must contain an order, and the note a promise, to pay. As regards the terms of the bill, it is not safe to use

¹ Clark, 22d Feb. 1823, 2 Sh. 239.

² Thomson, p. 14; Bell's Com. i. 389; Sharp, 24th June 1808, M. App. Bill of Exchange, No. 22; Macdougall, 13th February 1810, F. C.; Drummond, 18th February 1813; Hume, 71.

³ Chiene, 20th July 1848, 10 D. 1523.

⁴ Thomson, p. 8; Bell's Com. i. 389.

⁵ Cases cited by Thomson, p. 9.

⁶ Gordon, 3d June 1848, 10 D. 1129.

⁷ Viscount Garnock, Feb. 1721, M. 1401.

words which do not import an order. Lord Tenterden¹ held the following not to be a bill, because containing no demand as of right:—‘MR. LITTLE, —Please let the bearer have seven pounds, and place it to my account, and you will oblige your humble servant,—R. SLACKFORD.’ The express word ‘promise,’ however, usually employed in a promissory-note, is not absolutely essential. A document which ran thus, ‘At 14 days after date, I accept to pay to,’ etc., and which document was addressed to a party who signed it, was held to be a promissory-note by the party using the words, ‘I accept to pay,’ etc., and to warrant summary diligence against him.² The order or the promise must be to pay. It is not an exception to this, that in England the order ‘to deliver’ a certain sum has been held to make a good bill.³ On the other hand, a mere acknowledgment, that a party had left in the granter’s hands a certain sum, not accompanied by any promise to pay, has been found not a bill or note; and even where documents acknowledged the receipt of a sum, and went on to say, ‘which sum is to be repaid,’ or ‘which sum I promise to repay,’ without naming any time when, Lord Ardmillan, Ordinary, held that there was not that character of definite and express promise to pay at a certain time, or on demand, which was necessary to make them promissory-notes.⁴ It has further been held, that a note, by which the maker acknowledged to have borrowed a certain sum, adding, ‘which I promise never to pay,’ is a good promissory-note.⁵ The word ‘never’ must have been held as used *per incuriam*, or in order to commit a fraud; in either of which views the Court could allow no regard to it.

In regard to the address, which in bills may be taken as forming ADDRESS. part of the order, it will be kept in mind that a bill is a species of letter; indeed, reported cases of bills—beginning in the form of letters with the word ‘Sir,’ and closing with the words ‘your most obedient servant’—are to be found in our books of decisions. The bill ought always to contain the address of the drawee, describing him so as to distinguish him from all other persons. The address is written, in some countries, on the back of the bill. The general form, in this country, is to write it under the bill on the left-hand side; but either form is sufficient, and either corresponds with the practice, in every-day use, in addressing letters. It is not indispensable, however, in the address, to make use of the strictly correct preposition ‘to,’ nor indeed of any preposition at all. Documents, in the form of bills, which were addressed to the drawees thus, ‘at Messrs. John Morson and Co.,’ instead of ‘to Messrs. John Morson and Co.,’ or ‘at’ instead of ‘to John Perring and Co.,’ have been held valid bills, and to afford good grounds of action against the drawers.⁵ And, for the purposes of assignation to the payee of the drawer’s claim upon a trust-fund in the hands of the drawee, it was found enough that bills, drawn on the trustees who held the fund, were

¹ Little, noticed in Thomson, p. 7.

² M’Kinney, 15th July 1863, 1 Macph.

1115.

³ Thomson, p. 6.

⁴ Braid, 3d March, 1858, 20 D. 728.

⁵ Thomson, p. 7.

addressed thus :—‘ To Miss Jane Watt, Mr. James Watt, Mr. P. H. Thoms, and others, of Dundee, Scotland, testamentary trustees of the residuary estate of the late Thomas Watt, deceased.’¹ The objection to the bills, as not pointing out the drawees (who did not accept), was fully discussed in this case; and the Court held unanimously that the bills were good, the drawees being partly named, and all described. Further, in an ordinary action on a bill upon which there was no address at all, the want of the address was held to be supplied by acceptance; that being regarded as implying that the party actually signing as acceptor was the party for whom the bill was intended.² In such a case the bill would of course be a nullity without acceptance. In the case of Douglas,³ where the address had been torn off a bill recently and accidentally, the question was suggested whether the address was *inter essentialia* of a bill. That point did not require to be disposed of. The address should be simple and unconditional; and, when the bill is drawn on two or more individuals, all the drawees ought to be named in the address before the bill is issued. When a bill was addressed to one person only, and another accepted along with him, it was decided in England that there could be no action against the last of these persons as acceptor; it being held contrary to the custom of merchants that there should be a series of acceptors. But with us, if the additional acceptor subscribes before the bill is issued, the bill is equally good against him as against those to whom it is addressed.⁴ After the bill is issued, the subscription of an additional acceptor creates a new obligation, and on that account would vitiate the instrument on the Stamp Laws.⁵ The rubric of the case of Macara⁶ would appear to support the plea that a bill might be good, although an additional acceptor should sign it after it had been issued. But, from Lord Cringletie’s note in that case, it would seem that the additional subscription was supposed to have been adhibited before the bill was issued.

ORDER MUST BE
ABSOLUTE.

The order or promise, as contained in the bill or note, must not only be to pay, but must be absolute, and to pay at all events, as expressed in the bill or note; it must not be uncertain, or dependent on any contingency. A bill made payable only in a particular event (the books do not say what) was refused the privileges of bills.⁷ But, in a bill drawn by a married woman, the seclusion of her husband’s *jus mariti* is not construed as intended to make the payment conditional, but merely to designate the wife as the proper payee. The bill is therefore good.⁸ A condition made apart from, and not embodied in, the bill or note, does not, however, operate nullity. In the case of Innes,⁹ the delivery of a bill, which a person on his deathbed deposited with a third party, was,

¹ Watt, 21st Dec. 1853, 16 D. 279.

² Grierson, 28th June 1727, M. 1447.

³ Douglas, 20th July 1864, 2 Macph. 1389.

⁴ Macdougall, 13th Feb. 1810, F. C.

⁵ Home, 7th June 1836, 14 Sh. 898.

⁶ Macara, 18th Jan. 1822, and 3d June 1823, 1 Sh. 251, & 2 Sh. 360.

⁷ Campbell, noticed in M. 1410, as having occurred about December 1793.

⁸ Mungel, 11th Jan. 1750, M. 5771.

⁹ Innes, 13th Jan. 1802; Hume, 47.

by a separate relative letter, made conditional on the result of a law-plea then in dependence; but the Court sustained the bill, which in itself had no conditional or suspensive words. A bill or note, however, is not annulled though it contains statements or explanations which are extraneous to its proper nature, provided these do not limit or qualify the obligation contained in it; for example, a bill which, after ordering payment of the sum, contained these words, 'and this, with my receipt, shall be a sufficient discharge of all I can ask or claim of you, preceding this date,' was sustained, as the bill merely expressed the cause of granting, and could not be vitiated by specifying what would equally follow, though not stated.¹ Even such extraneous matter as this, however, although harmless, should be carefully excluded from a bill or note.

EXTRANEOUS
MATTER.

A clause of interest does not invalidate a bill or note. The leading case on this point is that of *Sword*.² It has been decided, likewise, 'that a bill is good, though it bear a clause, with penalty conform to law, because, by law, there is no penalty due,' and the clause does no harm.³ Such a clause, however, should of course be excluded.

The term of payment is usually expressed at the commencement of the bill or note; as, for example, 'three months after date,' or 'ninety days after sight,' etc., 'pay to me,' or 'I promise to pay.' It ought to be expressed in words, not in figures. The term of payment, as I formerly noticed, may be, in the case of a bill, on demand, or at sight, or on a particular day, or within a certain period after sight, or after date; and in the case of a promissory-note, on demand, or on a day certain, or within a certain period after date, according to the arrangement of parties; and foreign bills are sometimes drawn payable at or with reference to the period of usance. When a time is inserted, it must be absolutely clear of condition or uncertainty.

TERM OF
PAYMENT.

According to the earlier rules adopted in Scotland, bills made payable at very distant dates were not allowed the privileges of such instruments, but the law is now different. It is said by Byles,⁴ that 'if a bill of exchange be made payable at never so distant a day, if it be a day that must come, it is no objection to the bill;' and Lord Ivory, in his notes to Erskine,⁵ quotes that dictum as containing the true principle. The total sum in a bill or note may be made payable by instalments. Bills and notes in that form are frequently met with, especially in connexion with composition-contracts in sequestrations. And the Court have expressed an opinion⁶ that a note for payment of £50, in sixteen different instalments of three guineas a month, was a good ground of summary diligence. The point was not decided, the charge being turned into a libel,—that is, the charge was dealt with as the summons in an ordinary action,—but there can

¹ Trotter, 21st Feb. 1738, M. 1402.

⁴ Byles on Bills, p. 56.

² *Sword*, 23d June 1790, M. 1433, and note, p. 1435, correcting the report.

⁵ Erskine, iii. 2. 38.

³ M'Neil, 24th Jan. 1741, M. 1422; M'Lauchlan, 2d Jan. 1760, M. 1432.

⁶ Carron Co., 25th February 1796, M. 1457.

be no doubt that such bills and notes are good grounds of summary diligence, though, of course, only for the instalments past due at the time. The total amount to be paid, or the total number of the instalments, and amount of each, must, however, be expressed, and clear of all doubt.

PAYEE.

A bill or note may be made payable to the bearer, in which case it is available to any one who lawfully obtains possession of it, just as an ordinary bank-note. Notes in such terms are practically objectionable, as involving risk through their being lost or stolen; but they have been long considered good and legal documents, and not struck at by the Act 1696, cap. 25, directed against writs issued blank 'in the person's name in whose favour they are conceived.' When a bill is not payable to the bearer, the payee must be distinctly pointed out in the bill, and there must be no contingency or uncertainty as to who is truly payee. A bill will be vitiated if made payable with a substitution of payees, that is, to one party, or order, whom failing to another; the substitution importing a condition as to the payee, which makes a bill null.¹ It has also been decided in England,² that the obligation in a promissory-note cannot be granted alternatively to one or other of two individuals named; as that imports a condition affecting each of them, that the bill has not been paid to the other, creating a conditional obligation, and uncertainty and contingency as to the payee.

It is not necessary that the payee should be the beneficiary. A bill or note may be made payable to A., for behoof of, or as agent for, B.³ There is here no condition or uncertainty. In England, where action only, and not summary diligence, can proceed on a bill, a promissory-note to the trustees acting under A.'s will, without naming any of them, has been sustained. But in Scotland, when trustees are the payees, they should be named, or it would be unsafe to raise summary diligence; because the bill does not in itself show who are the payees. Extrinsic evidence is required for instructing who are the trustees and payees. This view is fully supported by the case of Fraser,⁴ where a bill, indorsed to 'the agent for' a bank, at a particular place, 'or order,' without naming the agent, was found not to warrant summary diligence at the instance of the agent. The bill did not of itself show who was the indorsee and holder. As already observed, however, a bill or note may be issued blank in the payee's name; in which case the holder's name may be filled up as payee, and he will be held as in the same position with a first indorsee.⁵

'OR ORDER.'

Bills and promissory-notes are usually granted to the payee, 'or order,' that is to the payee, or any one to whom, by indorsing the bill, he shall order the acceptor to pay; indorsation containing or implying an order to pay to the indorsee. In Scotland, it was long ago settled⁶ that these words were not required to give the payee the privilege of indors-

¹ Inglis, 27th July 1739, M. 1404.

² Thomson, p. 79.

³ Wixon, 22d June 1649; 11 D. 1168.

⁴ Fraser, 21st June 1853, 15 D. 756.

⁵ Thomson, Still, & Co., 6th June 1805; Hume, 53.

⁶ Crichton, Jan. 1726, M. 1446.

ing. It was held that there could be no more necessity to make a bill payable expressly to 'order,' than to make a bond payable expressly to 'assignees.' This rule has never been since controverted. But in England it has been held, that when a bill or note is without these words, though it is good in the hands of the original payee, it does not give the indorsee a good claim against any of the parties to the instrument, except his own immediate indorser. A bill or note, payable not to A., or order, but to the order of A., has been held to give the party named a good right to sue upon it, as well as to indorse it.¹

The maker of a bill or note ought to write on it the name of the place where it is made, and, likewise, if he himself is not well known, his own particular residence, that the holder may readily find him out when necessary; and it is the usual and regular course in Scotland to superscribe the name of the place where a bill or note is made, though this is not indispensable. Care should be taken to see that a place is inserted in such a case as that suggested by Professor Menzies, viz., of a bill bearing the words, 'Pay to me *here*;' and likewise, in the case of foreign bills payable at usance,—in which last case the day of payment cannot be ascertained without knowing the place drawn from. The place of making is required in England in bills and notes for sums under £5; but that is, by special Act of Parliament,² not applicable to Scotland.

In usual and correct practice, the date of drawing a bill, or of making a note, is marked in figures at the top of the instrument, and on the right-hand side; but, except to render the bill or note a warrant for summary diligence, it is not indispensable that it should be issued with a date, unless the term of payment depends on the date. Where the bill or note is payable on demand, or at sight, or on a specified day, or so many days after sight, it is a complete instrument in itself, without the date of drawing, except for summary diligence. But where the term of payment depends on the date, as, for example, when the bill or note is payable three months after date, the date is an essential. Bills and promissory-notes bearing dates prove their own date.³ It was well argued in Kennedy's case, that if bills do not prove the dates they bear, they can prove nothing at all. It is now competent, however, in all cases of bills or notes issued without date, to prove, by parole evidence, the true date at which they were issued.⁴ But, under the Mercantile Law Amendment Act, summary diligence is not competent on any bill or note issued without a date.⁵ This provision, you will observe, is absolute. It is applicable to all cases, not merely to those in which the term of payment depends on the date. If the bill or note bears no date, there can be no summary diligence upon it. The date is important also in Scotch bills with reference to the question of deathbed, likewise when bills are granted by women before their marriage, or by parties who allege minority as a defence against liability.

¹ Thomson, p. 86.

² 17 Geo. III. c. 30.

³ Kennedy, 8th July 1725, M. 1477.

⁴ Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, s. 10.

⁵ *Ibid.*

SUNDAY.

It was held, in the case of *Elliot and Son*,¹ not to be an objection to a bill, payable to the drawer, that it was drawn on Sunday. The bill in that case was drawn and dated in London, and accepted in Edinburgh, and, as the obligation was not constituted till acceptance, the time of the acceptance was the date to look to in connexion with the question whether the obligation was lawfully constituted. The acceptance, however, is not presumed to have been made on Sunday, merely because the bill bore date on that day, but according to the usage of merchants the contrary must be presumed.² Whether an acceptance dated on Sunday would be valid, has not been conclusively decided. Mr. Thomson³ mentions the case of *McPherson and Company* (which occurred in 1824, but is not reported), where the acceptors pleaded that they had accepted a bill on Sunday, as an objection to the validity of the bill, in a question with an onerous indorsee. The objection was repelled by the Lord Ordinary Mackenzie, whose judgment was acquiesced in. Professor Menzies⁴ holds the question of the legality of the acceptance of a bill upon Sunday as open, and says, 'It will be for the consideration of the Court, when the point shall arise, whether the same effect is to be given to the Scotch Statute, 1579, cap. 70, against all "handy-labouring or working" on the Sabbath, as, in the opinion of Broom (*Legal Maxims*, p. 21), would be given in England to the English Act, 29 Charles II. cap. 7, against doing or exercising any worldly labour, business, or work of their ordinary calling, on 'Sabbath.' 'In the meantime,' adds Professor Menzies, 'the matter is so doubtful, that a prudent agent, upon legal grounds merely (apart from reasons of a different and higher kind), will esteem it his duty, so far as his advice may prevail, to prevent its occurrence.'

I may here call your attention to sect. 12 of the Stamp Act, 1815,⁵ which provides against making or issuing a bill or note post-dated, so as to bring its apparent date within two months of the date of payment; that being a period with reference to which a lower scale of stamp-duties becomes applicable.

PLACE OF PAYMENT.

It is not absolutely necessary to specify the place of payment in a bill or note, but it is very desirable that such place should be pointed out, both for enabling the debtor to make his arrangements for payment, and to obviate any difficulty as to the negotiation, or, it may be, the protest of the bill or note, in case of doubt as to the proper place at which to apply for payment. We shall have occasion to notice this point further when considering the subject of presentment for payment at maturity. But when a bill is made payable in London, or any large town, the holder may insist that the drawee shall subjoin to his acceptance some particular house where it will be paid, as the holder may not otherwise know where to find the drawee. If the drawee refuse to subjoin such house, the holder may protest for non-acceptance.⁶

FOR VALUE RECEIVED.

Bills or notes frequently bear to be granted 'for value received;'

¹ *Elliot & Son*, 20th Jan. 1844, 6 D. 411.

² Thomson, p. 66.

³ *Ibid.*

⁵ 55 Geo. III. c. 184.

⁴ Menzies, p. 335.

⁶ Thomson, p. 342.

but it has long been settled that these words are not necessary, either in granting or indorsing them, in order to give the instruments their full ordinary effects.¹ In practice, it is not usual to insert the words in question in indorsations. The presumption is, that a bill or note is granted or indorsed for value instantly received, whether that is expressed or not; and the contrary can be proved only by the holder's writ or oath.²

If the particular kind of value is specified in the bill, no evidence but the holder's writ or oath can be received to contradict the statement.³ In Wallace's case, a bill was sustained in favour of the drawer, against the acceptor's heir, although the specification of the nature of the value was admitted to be false. The Court said :—'This circumstance will not annul a bill, provided value of any sort is either actually received, or in law presumed to have been received.'

CHAPTER II.

HAVING considered the form of the bill, I have now to call your **ACCEPTANCE.** attention to the transaction of the Acceptance. When there are only two parties,—the drawer (who is also payee) and the acceptor,—the former sends the bill to the latter, and on his signing his name as acceptor, and returning the bill to the drawer and payee, the transaction is completed. When the payee is not the drawer, but a third party, the unaccepted bill is usually sent to the payee, that he may present it to the drawee for acceptance, which he ought to do without any undue delay. This is a matter of prudence in all cases, because, upon acceptance, the drawee will be personally bound, which previously he is not; and, in case of non-acceptance, the payee will have immediate recourse against the drawer for payment, though the bill has not reached maturity.⁴ When the bill is payable at a certain period after sight, presentment for acceptance is necessary, in order to fix the term of payment. What is undue delay, will depend on the circumstances of the case; but unless there is cause for delay, over which the party has no control,—his illness, for example,—very little latitude is allowable. In the early cases of Innes⁵ and Andrew,⁶ bills at fourteen days' sight, and twenty-one days' sight, were not presented by the holders for acceptance, for ten days and three or four weeks respectively after it was possible to have presented them; and loss arose by the drawees' absconding and bankruptcy. In these cases, the Court held that there had been due negotiation. But the

¹ Scot, 19th March 1707, M. 1535; Macdowal, June 1731, M. 1541; Forbes on Bills, p. 49, and cases there cited. The same was held with regard to indorsation in Auchinleck, 15th February 1715, M. 1537.

² Wallaces, 29th Nov. 1793, M. 1484; and Pattison, 17th Jan. 1827, 5 Sh. 208.

³ Hay, 1st Dec. 1823, 2 Sh. 546.

⁴ Cowan, 20th June 1795, M. 1621.

⁵ Innes, 7th Feb. 1735, M. 1562.

⁶ Andrew, 21st Nov. 1759, M. 1584.

cases are very inapplicable to present circumstances, and cannot be held as sanctioning the like delay now, when there are facilities for the utmost despatch. In both cases, however, it was pleaded, apparently with effect, that bills at sight are a species of letters of credit, intended to be available to the holder when he requires the money, and so authorizing a greater latitude as to the time of presentment than bills at a fixed day's date. As to this question, therefore, something depends on the real purpose of the bill. It is not, however, enough merely to transmit the bill in due time to the drawee for his acceptance. In the case of *Falls*,¹ a bill payable three days after sight was received, and the same day sent off to the drawee for acceptance, but left in his hands unaccepted for twenty-nine days. The Court held recourse against the drawer to have been lost.

**PRESENTMENT
OF PROMISSORY
NOTES.**

Promissory-notes require no acceptance, and there is no obligation to present them, except for payment. But, if payable on demand, there should be no undue delay in their presentment. Greater latitude, however, appears to be allowable as to notes than bills. The objection of undue negotiation of a promissory-note for £500, payable on demand, and which was not presented till more than five months after date, was repelled.² Lord Moncreiff spoke of a distinction, as to negotiation, between bills and notes; adding, as to the note in this case, 'It was evidently not intended to be immediately enforced.' Lord Medwyn said, — 'The proper object of the bill is to be instead of a remittance of money, when a payment is to be made from one part of the country to another; the promissory-note is rather intended to be evidence of a debt, when money is to lie for some time in the hands of the granter;' and he held the case to be one of loan or debt—not of remittance. But, when the bill is payable on a day certain, or within a certain time after date, and the payment does not depend on the time of acceptance, the payee does not require to present the bill for acceptance in order to preserve his recourse, unless he is instructed to present immediately. The drawer, being aware of the time of payment, ought to have funds at that time in the drawee's hands to meet the bill.³ The judgment in *Jamieson's* case was given in conformity with a report of merchants, as to the practice of negotiation and protest in the case of bills payable as above. An agent, however, employed by the holder to negotiate the bill, is bound, without any delay, to present to the drawee, and obtain the additional security arising by acceptance. Where an agent, so employed, delayed to present until after the drawer became insolvent, and the drawee then refused to accept, the agent was found liable to make good the loss.⁴ This decision was pronounced after obtaining the advice of eminent English counsel, which is quoted in the report.

If the bill is payable at a bank or other specified place, it ought to be presented there, though the drawee may not happen to be there per-

¹ *Falls*, 17th June 1766, M. 1593.

² *Leith Banking Co.*, 22d Jan. 1836, 14 Sh. 332.

³ *Fergusson*, 16th Feb. 1727, M. 1558 ;

Jamieson, 28th June 1749, M. 1579.

⁴ *Dunlop*, 16th Jan. 1810, F. C.

sonally ; if without a specified place of payment, and drawn on bankers or a trading company, it ought to be presented at their place of business. PLACE OF PRESENTMENT. If on an individual, it ought to be presented to him personally, or at his counting-house if he is in business, or his dwelling-house if he is not in business.¹ The presentment, however, ought to be within business hours. A bill, payable at the shop of the acceptor, who was a flesher, was presented there for payment about eight o'clock in the evening after the shop was shut,—and the protest was reduced.² What are 'business hours,' is a question for a jury.

If the drawee has funds in his hands belonging to the drawer, at the time when the bill is presented for acceptance, and, apparently, if he is bound to have goods converted into cash, as at the time when the bill will fall due, he is bound to accept, or, as it is usually expressed, to honour the draft. But, even if he refuses (in which case, and also in case of non-payment when due, a bill or note is said to be dishonoured), the presentment of the bill, duly proved, will operate an intimated assignation to the payee of the drawer's funds in the drawee's hands, to the amount of the sum in the bill.³ Indeed, it has been decided that the presentment of a bill to the holder of funds which had not at the time vested, but afterwards did vest, in the drawer, operated, though acceptance had been refused, an assignation to the payee of these funds when they subsequently vested. Whether such presentment operated also intimation of the assignation was not decided, intimation being otherwise sufficiently established.⁴ But the drawees are entitled to plead counter-claims against the drawer, as exhausting his funds in their hands, and relieving them of liability to him, or to the payee as in his right.⁵ The payee, however, will have a preferable claim upon such funds over a posterior arrester thereof in the hands of the drawee or acceptor.⁶ EFFECT.

If the drawee is not duly provided as to funds belonging to the drawer, he is under no obligation to accept. But there may be acceptance for honour, or conditional or partial acceptance. Acceptance for honour is when the drawee, though not provided as to funds—or a third party, if the drawee refuses, or is bankrupt,—accepts for the honour of the drawer, or of an indorser. That is to say, when, in order to prevent the dishonour of the bill, the drawee, or a third party, not being legally liable, undertakes nevertheless to pay the bill ; but, in place of incurring the full obligation and liability, arising in the case of the drawee by simple acceptance, preserves recourse against the party for whose honour the acceptance takes place, and against indorsees or others deriving right to the bill through him. In such cases the acceptor signs his name upon the bill, at the usual place, adding to his subscription the letters, '*S. P.*,' that is, '*supra protest* ;' and the whole transaction must be ACCEPTANCE FOR HONOUR.

¹ Bell's Comm. i. 413.

² Neilson, 7th Feb. 1843, 5 D. 513, and 9th Feb. 1844, 6 D. 622.

³ Gordon, 9th Dec. 1712, M. 1490.

⁴ Carter, 20th March 1862, 24 D. 925.

⁵ The London Joint-Stock Bank, 15th July 1859, 21 D. 1327.

⁶ Gavin, 17th Nov. 1768, M. 1495 ; Campbell Thomson & Co., 28th May 1803, M. App. Implied Assignation, No. 2.

embodied in a notarial instrument of protest. This transaction is called 'acceptance for honour,' or 'acceptance *supra* protest.' Subjoined to the protest is the 'act of honour,' the terms of which I will explain after going over those of the protest. The holder is not bound to receive an acceptance for honour from a third party; and, apparently, he may, if he thinks fit, refuse to take such acceptance even from the drawee,—because, in a question with the drawer, he is entitled to demand a simple acceptance from the drawee. But, if the drawee is willing to accept for honour, the holder, if he refuses such acceptance, is not entitled to proceed instantly against the drawer and indorsers (as he could do in a case of absolute refusal to accept); because the drawee's acceptance for honour would, as regards the holder, be equally obligatory with his simple acceptance. But, if the acceptance for honour is from a third party, in consequence of the drawee's refusal or inability to accept, then the holder appears entitled immediately to proceed against the drawer and indorsers, because he has not got what they engaged for, viz., the drawee's acceptance. When there is acceptance for honour by a third party, the holder requires to give notice of it to all concerned, in the same way as he would have to give notice of dishonour,—as to which I will presently speak. In such cases, the drawee has refused to accept, or is disabled from accepting,—and, as far as he is concerned, the bill has been dishonoured. But, where the acceptance for honour is by the drawee himself, no notice from the holder seems necessary. In all cases, however, the acceptor for honour requires to give, to all against whom he is to preserve recourse, the same notice which he would give them in an ordinary case of dishonour, were he the holder of the bill.

CONDITIONAL
OR PARTIAL
ACCEPTANCE.

We now come to the case of conditional and partial acceptance. Though bills must be drawn, and notes made, free of intrinsic conditions, acceptance may be given subject to conditions, which, if embodied in the bill, and not merely in a separate paper, will be effectual against even an onerous indorsee.¹ As the fulfilment of the condition, however, is essential to the constitution of the acceptor's obligation, a bill so accepted would, apparently, not be a warrant for summary diligence, but only for ordinary action, in which the fulfilment of the condition would require to be expressly averred and proved. There may also be partial acceptance for any specified proportion or amount of the sum in a bill.

When only a conditional or partial acceptance is offered, the holder may refuse it altogether, or, in his option, may take it. But in either case notice must immediately be given to all concerned. This should be done by the holder, who is also, in either case, entitled to protest for non-acceptance; because, in conformity with the order, he is entitled to ask for a simple and full acceptance, which he does not get. In reference to a foreign bill, he ought to take such a protest, otherwise he will lose his recourse. For an inland bill, he will not lose his recourse,

¹ Stair, i. 11. 7; Thomson, 348.

though he takes no protest, but he must preserve evidence of presentment and dishonour, and give notice.

In the case of a partial acceptance, the notice and the protest, if taken, ought to specify whether the holder is to avail himself of the acceptance or not, and thereby show whether he has a claim on the drawee or not. If he acquiesces in the acceptance, he will have a corresponding claim on the acceptor; if not, he can make no claim thereon. The drawee offered him an obligation, which he refused. The time within which the notice must be given, and the manner of giving the notice, will be considered along with the subject of presentment for payment followed by dishonour.

CHAPTER III.

HAVING now considered the general principles applicable to the constitution and structure of bills and promissory-notes, I will proceed to the subject of their transference, deferring the important question of the liabilities which they create, until we can, at the same time, deal with the liabilities constituted in connexion with their transference, when accomplished in the usual form by indorsation.

1. Bills or notes may be transferred by mere delivery from hand to hand, in several circumstances—(1.) when they are payable to the bearer; (2.) when payable to A. B. or bearer; (3.) when blank in the payee's name; or (4.) when blank indorsed. TRANSFERENCE
OF BILLS AND
PROMISSORY-
NOTES.
BY DELIVERY.

2. When the bill or note is payable to a particular person without an alternative in favour of the bearer, the transfer requires not only delivery, but also an order, express or implied, by the holder, in favour of the indorsee. The order is called an indorsation, being usually written on the back (*dorsum*) of the bill or note. When implied, it is called a blank indorsation; when express, a special or full indorsation. But the order, whether express or implied, may be written on the face as well as the back. A bill or note can be transferred by indorsation at any time before it is paid. BY INDORSA-
TION.

An indorsation, equally with the bill itself, is probative; and, if made to an onerous *bonâ fide* indorsee, before the term of payment arrives, it transfers the bill or note, free of any latent objections or exceptions pleadable against the indorser. But, under the Mercantile Law Amendment Act, sect. 16, indorsees, acquiring after the term of payment, are subject to all objections or exceptions pleadable against the bill or note, as in the hands of the indorser. Parties, therefore, acquiring overdue bills, even for full value, must rely on the good faith of the indorser, and likewise on his responsibility; because there may be objections or exceptions which, though unknown to him, will reach the

onerous indorsee. An indorsee, acquiring without value, is placed in the same situation with his author, whatever be the date of the transfer.

The indorsation may be either before or after acceptance; but it must be made by the party in right of the bill, or one duly authorized on his behalf; and the party must be of full capacity. But, as a bill payable to a woman becomes her husband's property by her marriage (if the right of the husband is not validly excluded), the husband (if not excluded) has the power, after the marriage, of indorsing the bill, just as if it had been granted to himself. He cannot, however, under the title arising by the marriage, raise summary diligence on the bill at his own instance. That title does not appear on the face of the bill, and the whole grounds and warrants of diligence must be apparently and manifestly entire.¹ It would be well, therefore, where a bill becomes the property of a husband by his marriage, that his wife should indorse the bill to him, or join with him in indorsing to a third party, so as to preserve the right to do diligence entire. Executors also are entitled to indorse a bill, falling to them under the will, or otherwise as in right, of a deceased holder, but not until their title is completed by confirmation. Previously they have no active right. If the indorsation is by one acting for another, care must be taken to see that the party acting has adequate powers, and subscribes so as to bind his constituent. And, on the other hand, the party acting for another must take care not to subscribe so as to bind himself.

FORMS OF
INDORSATION.
BLANK
INDORSATION.

The forms of indorsation are various, and with different effects.

1. We have first, and most usually, the mere subscription of the name of the holder on the back of the bill, which is called blank indorsation; it being implied, as already explained, that, above such subscription, there is written an order to pay to the new holder. Hence indorsation was of old called 're-drawing.' Such indorsation, as I have mentioned, transfers the bill to the bearer, involving certain risks, of which examples are shown in the following cases, viz. :—

(1.) The case of Scott,² where a bill, which had been lost by the true owner, fell into the hands of a party who discounted it with a bank for value, and the indorsees, who acted *in bond fide*, were held to have a good title; and (2.) the case of Lambton and Co.,³ where the same result followed the *bond fide* negotiation of a bill which had been stolen.

By the Mercantile Law Amendment Act, sect. 15, it is provided, that, when any bill or note has been lost or stolen, or fraudulently obtained, the holder, suing or doing diligence thereon, shall be bound to prove that value was given by him for the same,—parole proof being declared competent. This provision, however, would not reach such cases as I have noticed, because in these the holders had given value.

SPECIAL
INDORSATION.

2. I next notice special or full indorsation, which usually runs in these words,—'Pay to A. B., or his order,' or simply, 'Pay to A. B. ;' the

¹ Smith, 10th July 1829, 7 Sh. 885.

² Scott, 27th Feb. 1812, F.C.

³ Lambton & Co., June 1799, M. App. Bill of Exchange, No. 8.

holder's subscription is then subjoined. As regards the indorser, the effect of a full indorsation is precisely the same as of a blank indorsation. But a bill indorsed to a new holder by name is not transferable from him by mere delivery to another. If there is no prior blank indorsation, the subscription of the person named is required, but he can transfer by blank or by full indorsation equally with the person who indorsed to him. If there has been a previous blank indorsation, the special indorsee can also transfer the bill to a new holder by deleting the special indorsation, whereupon the previous blank indorsation will come into operation, and the bill will pass by delivery to a new holder. The benefit of the full indorsation then is, that it gives a certain amount of protection against risk from the bill being lost or stolen. But it must be kept in view that, if there are several indorsations, it is not enough for protection against such risk that the last shall be special. If the bill is lost or stolen, the bearer for the time can delete the last and special indorsation, whereupon the previous blank indorsations will come into operation, and the bill can be transferred to a new holder, just like one which has been only blank indorsed. The risk can be completely guarded against only by making all the indorsations full or special. Practically, however, the risk is not much felt, and it is greatly diminished by the provision in the Mercantile Law Amendment Act, sect. 16, that parties acquiring overdue bills take them subject to all exceptions competent against their authors.

3. Indorsations may be limited in regard to their effects, either as against the indorser, or as in favour of the indorsee. The indorser, in the general case, not only transfers the bill or note, but as ordering the obligants to pay to a new party for value, which is always presumed, becomes liable to that party, and those who derive right to the bill through him, for payment of the amount of the bill, in the same way as if he had drawn a new bill, or granted a promissory-note to his indorsee. But it can be arranged that the bill is to be transferred by the holder without his incurring that liability to his indorsee. The holder in such cases simply adds to his indorsation the words 'without recourse.' The transfer of the bill will still be complete; but the party who has indorsed the bill as above will be protected against liability for payment of the bill to his indorsee, or any other person; 'a fresh instance,' as Professor Menzies says, 'of the remarkable simplicity of these instruments, and of the facility with which important effects are produced by the use of short conventional phrases universally understood.'

4. The holder of a bill or note can make a restrictive indorsation,— for example, by indorsing it to a certain person, 'for my use,' or 'for my account.' Such indorsation, however, though it will prevent the indorsee from using the bill for his own purposes, by depositing the same (indorsed) in the hands of a creditor of his own in security, will not prevent him from effectually discounting the bill, whilst current, with a *bond fide* third party. The legal title to transfer to such third party is in the

INDORSATION
WITHOUT
RECOURSE.

RESTRICTIVE
INDORSATION.

payee, though only for the use or on account of another; and third parties taking from such payee are protected because of his title, and because the money, drawn by him on discounting it, will be held to have been received to the use or account of the indorser. But, still, the payee is only the indorser's agent or mandatory, with a mandate which can be recalled at pleasure.¹ The legal title to transfer is likewise in the agent, where the bill is made payable to A. B. as agent for C. D.²

INDORSATION IN
FAVOUR OF IN-
DORSEE ONLY.

5. But the indorser can prevent the indorsee from discounting the bill, by making it payable to the indorsee 'only,' or by ordering the amount to be credited to the account of the indorsee.

CONDITIONAL
INDORSATION.

6. The holder can make a conditional indorsement, which may be in such terms as to exclude the right of the indorsee till the condition be fulfilled, and, if the condition be never fulfilled, to bring back the bill to the indorser.³ Mr. Thomson quotes an English case, in which a bill was indorsed, payable to a certain person in a specified event. There were several subsequent indorsations. The acceptors had paid to the holder before the fulfilment of the condition which qualified the first indorsement; that condition was never purified, and the acceptors were found liable to pay a second time to the first indorser.

INDORSATION
REVOCABLE BE-
FORE DELIVERY.

7. Before delivery of the bill or note to the indorsee, the indorsation is revocable, and can be cancelled; an indorsement in trust for particular creditors, to whom it is not intimated, is still revocable; and the bill can be carried off by the diligence of other creditors; because, as long as the trust is revocable, the trustor remains undivested.⁴

The indorsee's right, when completed by delivery, draws back to the date of the indorsement, if dated. If not dated, the rule heretofore has been that the indorsement draws back to the date of the bill.⁵ How far that rule will now be open to modification in cases of indorsement after the bill is overdue, appears worthy of consideration; because the Mercantile Law Amendment Act makes indorsees, acquiring after the date of the Act, liable to such exceptions and objections as are pleadable against their authors. It would seem reasonable to hold the date of indorsement open to proof, in order to let in such exceptions or objections, just as any other fact would be; and, for protection against objection on this point, it may in some cases be advisable, when a bill is transferred before it is due, to preserve evidence of the date at which it was so transferred.

OTHER MODES
OF TRANSFER.

Hitherto we have been considering transfer by delivery or by indorsation, but the transfer can be made in other ways in various circumstances.

1. In any case it can be by assignation from the holder. That, however, is not a usual mode when indorsation will suffice.

¹ Thomson, p. 274.

² Wixon, 22d June 1849, 11 D. 1188.

³ Thomson, p. 275.

⁴ Stonehewer, 21st July 1697, M. 7724;

Gray, 16th June 1706, M. 7724; Auchterlony's Creditors, Nov. 1732, M. 7737.

⁵ Erskine, iii. 2. 25; Graham, 15th May 1794, Bell's Folio Cases, 5.

2. When the party paying was formerly a holder of the bill, for example, the payee or an indorsee, the bill can be re-transferred to him, either by the holder's indorsation,¹ or without indorsation, by simply deleting the indorsations in virtue of which the bill was transferred from him. Suppose, for example, he was the third of five indorsers, the holder will delete the fourth and fifth indorsations. The third also, that is, the indorsation of the party himself re-acquiring, may be delete or not without affecting the right of that party.² When a bill is so acquired, or re-acquired, as the case may be, the holder can re-issue it; but not to the effect of giving new indorsees any claim against parties to whom he himself is liable. He has no claim against such parties, and he can give none, even if the bill is current,—because the bill shows, *ex facie*, the position of the then holder, and the respective liabilities of himself and the others. Neither has the payee and first indorser, acquiring by indorsation from the last indorser, right of recourse against intermediate indorsers,—because they, if called on to pay, would just fall back on the first indorser himself.³ Moreover, when a bill is accepted for the accommodation of several parties, no one of these parties, acquiring the bill from the holder, can use it against the acceptor, notwithstanding the acquisition shall have been made onerously. The party acquiring the bill cannot plead onerousness against the acceptor, who not only was under no liability to those whom he had accommodated, but had a good claim against them.⁴ The case of Bousie strongly illustrates the importance of preserving evidence for instructing who is the proper debtor under a bill, when any one joins in a bill for the accommodation of another.

3. When the bill is acquired by the drawer, not being payee, he cannot obtain a title by merely deleting indorsations, because he never was the holder. He can obtain his title only by indorsation or assignation from the holder; and the bill, when it comes into the hands of the drawer, not being payee, is extinguished against the whole indorsers, including the payee, because the drawer himself was liable in payment to them. The drawer may, or may not, have a claim against the acceptor, according to the state of accounts between them; but his claim, if any, against the acceptor, is the only right which can remain under the bill.

It may be further noticed on this subject, that, after a bill or note is paid in part, it may be indorsed for the balance. But the holder is not entitled to grant two indorsements for separate portions of the *cumulo* sum in one bill or note. The acceptor is not bound to allow two separate actions, or separate diligence, on the same contract, unless he has accepted after such divided indorsements, in which case, it is said, he undertakes to pay the bill agreeably to them. But the drawer and

¹ M'Lachlan, 16th June 1831, 9 Sh. 753.

² Fairholms, 7th Jan. 1752, M. 1474; Adam, 13th Dec. 1827, 6 Sh. 244, & F. C.;

correcting Russell, 27th Jan. 1824, 2 Sh. 648.

³ Dickie, 27th Feb. 1828, 6 Sh. 637.

⁴ Bousie, 18th Feb. 1832, 10 Sh. 355.

ASSIGNATION
OF PROTEST,
ETC.

indorsers, previous to his acceptance, will not be so bound by it; and, as divided indorsements are not merely transferences, but constitute distinct and separate obligations, it may be doubted if they are valid in terms of the Stamp Acts, being written only on one stamp.¹ But, after a bill or note has been protested, or followed by decree, or ranked—that is, admitted—as a claim in a sequestration, or in a process of ranking and sale, or under a private trust for creditors, or after it has been allowed to form a claim in a process of multiplepounding, its transfer by indorsation, though legally competent, will not carry the instrument of protest, or the decree, or claim and dividends in the ranking, or trust or multiplepounding. The protest, or decree, or claim, or dividends, can only be transferred by assignation, in which, as matter of course, the bill should be included.² An assignation ought to be made use of, also, when any guarantee, or other collateral obligation or security, for payment of the bill or note, is to be transferred; as indorsation is not a habile mode of transferring such an obligation or security.³ But, where a cautioner has paid the bill to the holder, diligence raised in name of the holder may competently be carried on in the same name for behoof of the cautioner, though the latter has no assignation.⁴

Transfer by indorsation is complete without intimation, so far as regards the bill or note itself. When an assignation is used, it would appear at least the safest course to intimate it to the parties liable, even if it contains only the bill or note. And certainly, when it covers a protest or decree, or the claim or dividends in a sequestration, trust, ranking, or multiplepounding, it ought to be intimated in the way usual in assignations of ordinary personal debts, or ‘choses in action.’ But transfer by mere indorsation passes to the indorsee funds in the drawee’s hands, to the extent to which these have been transferred to the payee, by the presentment of the bill for acceptance, subject always, even as against an onerous *bond fide* indorsee, to counter claims on the part of the drawee as against the drawer.⁵

In conclusion, on this subject, I may remind you of the provision in the Stamp Act of 1854,⁶ against transferring or negotiating any bill drawn and issued in, but payable out of, the United Kingdom, and purporting to be drawn in a set, without at the same time transferring or delivering, on duly stamped paper, the whole number of the bills which the set is said to consist of. The same section declares that any person taking or receiving in the United Kingdom any such bill, either in payment, or as a security, or by purchase, or otherwise, without having transferred or delivered to him, duly stamped, the whole bills of the set,

¹ Thomson, p. 269.

² 1 Bell’s Comm. 404, Note 1; Anonymous case, 28th Nov. 1754, 5 Br. Sup. 820.

³ See Thomson, p. 278; remarks on the case of Forbes & Co., 29th May 1816, F. C.; see also Wallace, Hamilton, & Co. 8th June 1821, 1 Sh. 53; affirmed 23d June

1820, 2 Sh. App. 467; M’Lachlan, 16th June 1831, 9 Sh. 753.

⁴ M’Kechie, 13th Dec. 1831, 10 Sh. 126.

⁵ London Joint-Stock Bank, 15th July 1859, 21 D. 1327.

⁶ 17 & 18 Vict. c. 83. s. 6.

shall not be entitled to recover on the bill, or to make the same available for any purpose whatever.

Before proceeding further, it will be convenient here to explain the nature of the claim of the holder of a bill or promissory-note against the several parties to such instruments, and the liabilities of the parties respectively, both to the holder, and *inter se*, in cases where the liability of the parties is not limited. The acceptor, drawer, and indorsers of the bill, and the maker and indorsers of the note, are all liable, jointly and severally, to the holder of the bill or note. When there are two or more drawers or acceptors of a bill, or makers of a promissory-note, their liability is joint and several to the holder; and the liability of two or more acceptors is the same, though the bill may happen to be drawn on them 'conjunctly,' without the words 'and severally.'¹ And, where a private or unincorporated company has signed a bill or note, not only the company in its social capacity, but all the partners individually are severally liable *in solidum*.² The nature and extent of the liability of the partners or members of incorporated companies, whether limited or unlimited, has been explained in a former Lecture.

With regard to the liability of the parties to the bill or note in questions with one another, the last indorser has right of total relief, and (if and so far as he has paid the money) right of recovery from all the prior indorsers, the drawer and acceptor of a bill, and the prior indorsers and maker of a promissory-note, jointly and severally; and so on backwards, each indorser has a corresponding right of relief and recovery from all the prior indorsers, the drawer and acceptor of a bill, and the prior indorsers and the maker of a promissory-note, jointly and severally. When the drawer of a bill is the person entitled to relief and recovery, his claim lies against the acceptor only, but extends to the whole sum due. In the case of a promissory-note, the first indorser's claim lies only against the maker, but is for the whole sum due. The holder has therefore right (until he obtains full and complete payment) to adopt proceedings for enforcing payment, against all or any one or more of the parties to the bill or note, and the last and prior indorsers in their order have similar rights (in this case for enforcing relief or payment), but only against those liable to them respectively as above explained; and the proceedings of the drawer of a bill can be against the acceptor only; of the first indorser of a note, against the maker only. Two or more drawers or acceptors of a bill, or two or more makers of a promissory-note (though each would be liable *in solidum* to the holder, and to the parties entitled in their order to relief or payment as aforesaid), would be liable to each other only rateably and proportionally according to their number.

The proper debtor in a bill is thus the acceptor; and in a note the maker, in the general case. These parties have expressly undertaken, or promised, to pay to the payee, or those in his right; and the acceptor

¹ M'Kellar, 7th June 1811, F. C.

² Thomson, 2d July 1812, F. C.

ACCOMMODATION BILL.

has, or is presumed to have, funds in his hands belonging to the drawer, sufficient to meet the obligation so undertaken. The maker of the note is, or is presumed to be, debtor to the payee in the amount of the note. After the acceptor in the bill, the drawer is next liable. It is on the drawer's order that the acceptor's obligation has been undertaken; and the drawer has sold his order on the acceptor to the payee or indorsee. He is bound, if necessary, to make good the obligation so undertaken, and to give effect to his own order, bought and paid for. Next after the drawer of the bill, and next after the maker of the promissory-note, is the first indorser. He has given a new order on all the parties bound to him, to pay to his indorsee for value; and, if these parties do not pay accordingly, he must fulfil the obligation, and give effect to his order; and so on to the last indorser; the whole, as already mentioned, being liable, jointly and severally, to the holder. But the above rule, as regards the liability of the parties *inter se*, is founded on presumption; and, where sufficient evidence is produced to overcome the presumption, the liability of the parties *inter se* will be imposed according to the state of the fact, that is, upon the proper debtor, whoever he really is. Thus, where an acceptor had interposed for the drawer's accommodation, and the acceptor's representatives after his death paid the debt, and got it assigned to their agent, the agent was found entitled to do diligence against the drawer. The drawer was here the proper debtor, and not the acceptor.¹ On the other hand, where the acceptor's agent, as in the place of the acceptor, had paid the debt, and there was no evidence to redargue the presumption that the acceptor was the proper debtor, the Court refused to ordain the holder to assign to the said agent, so as to authorize his doing diligence against the drawer.² But, in a case where there were two acceptors, and a third party, at the request of one of them who was charged under diligence to pay to the holder, offered payment to the holder upon receiving an assignation to the debt and diligence; the Court found the holder 'not entitled to refuse payment of the debt from' this third party. They found the holder bound to assign the debt, and the diligence thereon, to such third party, but without recourse upon the holder so assigning.³

Cases like the above are to be disposed of according to circumstances. There is not any absolute rule in favour of the right of a third party to require an assignation on making payment. But, in general, when such assignation is granted, or a bill over-due is, on payment, indorsed so as to be kept up as a document of debt and ground of diligence, and not discharged, it may be prudent for the holder to assign or indorse it without recourse. And, when any one joins in a bill for the accommodation of another, he ought to obtain and preserve good evidence that he has interposed solely for the benefit of the party whom he has assisted; and that such party is the proper debtor, and bound to relieve him of all

¹ Napier, 16th Nov. 1810; Hume, 65.² Cameron, 2d Feb. 1830, 8 Sh. 430.³ Rainnie, 7th March 1822, 1 Sh.

377.

liability. The presumption of law has settled the order of liability, as above explained, in the general case, and, if the party who has given the accommodation cannot overcome the presumption by sufficient proof, he may be made liable to pay the debt, even in a question with the proper debtor. Questions on such points may not often occur with the parties accommodated themselves; but, in case of their death, it may be the necessary duty of their representatives, perhaps trustees or guardians for minors, to apply the rule of law with the utmost strictness; and due provision can easily be made against that contingency.

And here I may notice several important points of distinction between the case of a bond and bill-debt. When there are two or more parties to a bond, there is no several liability *in solidum* to the holder, unless it is so expressed. In the case of a bill or note, each of several parties is liable *in solidum* by law. In the former, the case of a bond, the cedent when he transfers the debt is done with it, assuming always that there was a debt, and that his title to transfer was good. In the latter, the case of a bill or note, as the assignation implies or expresses an order, as well as a transfer, the cedent, on whose order the indorsee makes payment, remains liable to his indorsee, to whom he may be compelled to pay the debt; having, however, in that case, right of recovery from prior obligants. Moreover, the assignee of a bond is liable to all the exceptions pleadable by the debtor against the cedent. The indorsee of a bill is liable to such exceptions, only in case the indorsation was granted after the bill became due. And the indorsee's right is complete without intimation; the assignee's requires intimation to complete it. Again, the debt due by bond, though personal as to succession, does not fall under the *jus mariti* or *jus relictæ*, or *fisk*, if acquired after the term of payment of principal or interest; or if the term of payment be distant; whereas a debt due by a bill is in all respects on the same footing with other personal estate. Lastly, a bond subsists as a document of debt for forty years, a bill or note only for six years, after the term of payment in each case respectively has come.

DISTINCTION
BETWEEN BOND
AND BILL-
DEBTS.

We now come to consider the effect of payment of the sum due by a bill or note. If the bill be paid by the proper debtor to the proper creditor, it is extinguished. The debtor has fulfilled his obligation, and all other parties liable are thereby discharged. In these circumstances, the bill or note cannot be re-issued, even to a *bond fide* onerous indorsee.¹ Extinction follows payment by and to the right parties, whether made before or after the bill falls due. But the creditor cannot be compelled to take payment before the bill is due. And payment to a mandatory, for the creditor, ought not to be made until the bill is actually due,—because the mandate may be previously recalled. Neither ought a bill, payable to the bearer, to be paid before it is due; because it may have been lost or stolen from the true owner; who is not to be deprived of his money, by premature payment to a wrong party. Moreover, assuming

EFFECT OF
PAYMENT.

¹ 55 Geo. III. c. 184, s. 19.

that the holder's title is free of condition or qualification, the acceptor ought to pay to him only. If payment is made to the original creditor, or to any other person who may have had right to the bill, but has transferred his right without condition or qualification, payment must be made over again to the holder.¹

On payment being made, the legal presumption is that it is made by the acceptor, when he is the proper debtor. That presumption was allowed effect in the cases noted below, where it was alleged that the payment was made by a third party, and when such third party would have been entitled to recover from the acceptor if he could have proved his allegation.² And, in accordance with the presumption on that point, it has been found that a receipt for payment in full, expressed in general terms and indorsed on a bill, operates extinction of the debt as against the acceptor, unless the contrary be proved by his writ or oath.³ But, if the general receipt is only for a partial payment, a full and special receipt can afterwards be given when the balance of the bill is paid, so as to enable the party paying to keep up the whole debt against the proper debtor.⁴

GENERAL
RECEIPT.

These cases show the importance of obtaining a special receipt in favour of the party paying, whenever he is not the proper debtor, but one having a right of recourse against another obligant. The party making payment ought also to obtain delivery of the bill or note, and, if there are parts or sets, delivery should be got of them all. The acceptor is entitled to such delivery when payment is made out of his funds.⁵ And, if a bill past due be found in the acceptor's hands, the presumption is that he has paid it, although it may bear no receipt for the money. On the other hand, where bills were found in the repositories of the holder on his decease, the acceptors were held liable in payment, notwithstanding allegations of payment, which, however, they could not prove.⁶ And, where the drawer was in possession of the bill which he averred he had paid, the presumption of payment by the acceptor, who was the proper debtor, was not admitted.⁷ The possession of the bill or note, however, must be lawfully obtained.⁸ In Edward's case the acceptor had obtained possession improperly, and the Court ordered him to deliver up the bill to the proper owner.

We have hitherto been considering the case of payment by the proper debtor; but it is necessary to keep in view the course to be followed by an obligant not ultimately liable, on his making payment. A party so situated will acquire right to the bill, with the claims on all those thereby liable, except in so far as he is himself liable to any of them. Thus, if he is the third of five indorsers, his claim will be against

¹ Erskine, 12th Dec. 1711, M. 1501; Fairholm, 24th June 1714, M. 1506.

² Brown, 14th June 1809, Hume, 62; Jackson, 9th Dec. 1825, 4 Sh. 292.

³ Martin, 8th Dec. 1854, 17 D. 143.

⁴ Soutar's Representatives, 29th June 1827, 5 Sh. 876.

⁵ Thomson, 1st Dec. 1841, 4 D. 136.

⁶ Waddell's Trustees, 24th May 1833, 11 Sh. 655; Irvine, 6th March 1840, 2 D. 804.

⁷ Donaldson, 10th June 1852, 14 D. 849.

⁸ Edward, 26th June 1823, 2 Sh. 431.

the acceptor, drawer, and two prior indorsers. The holder's transfer will give him no right as against the last two indorsers, because he, the obligant paying, is himself liable to them.

CHAPTER IV.

WE now pass to the consideration of the subject of the Negotiation NEGOTIATION. of Bills and Notes when they fall due.

It is part of the contract between the parties to a bill or promissory-note that, when the same arrives at maturity, it shall be duly presented by the holder for payment; and even bills of which acceptance has been refused ought to be presented at maturity for payment.¹ And here it may be noticed, that in all bills and notes, except those payable on demand, and perhaps those payable at sight, days of grace, as they are DAYS OF GRACE. called, are allowed. It does not appear to be fully settled that such days are allowed in the case of bills payable at sight; but the authorities rather seem to favour the view that they are.² In Great Britain the days of grace are three; and, where the currency of the bill is so many months, the time is not computed by lunar months. For example, a bill dated 1st January, and payable three months after date, is not due till 4th April, being on the expiry of three calendar months from the date of the bill, and three days in addition. But entire calendar months are not necessarily allowed. Thus, a bill dated 30th April, the last day of that month, payable three months after date, is not current for the entire months of May, June, and July, and the first three days of the month of August. The three months from 30th April are held to expire on 30th July, and three days after that date are the days of grace.³ The bill in Jarron's case was not protested till 3d August, and recourse was lost; the judgment proceeding on the practice of merchants. On the other hand, a bill cannot be protested on the day when it falls due, independently of the days of grace.⁴

Professor Menzies says the three days are an indulgence, not to the debtor, in the way of giving time, but to the creditor, in order to give him full opportunity of presenting, so as to preserve his recourse; and that, accordingly, he may present on any one of the three days; and the law was so laid down by one of the Judges in the case of Charles Forbes, however, in his Treatise on Bills, calls the days of grace a respite to the debtor; Mr. Thomson⁵ says it has been settled in England that presentment there must be only on the last of the days of grace; and he expresses an opinion that the law as in England would be applied in

¹ Menzies, p. 364.

² Jarron, 17th June 1803, M. App., Bill of Exchange, No. 14.

³ Thomson, p. 377.

⁴ Charles, 2d July 1788, M. 1614.

⁵ Thomson, p. 430.

Scotland on that point. Certainly, by the uniform practice, the presentment is made on the third of the days of grace; and, except as regards parties who have accepted for honour, or to whom there is a reference in case of need, it must take place then at latest, otherwise recourse on the drawers and indorsers will be lost.¹ In a recent case the question arose whether the indorsee of a promissory-note, transferred on the second of the days of grace, was liable to the exceptions and objections pleadable against the indorser, in respect that the indorsation was made after the bill became due. The Court held that the indorsee was free of such exceptions and objections, which implies that the bill was not due until expiry of the days of grace, and that these days are an indulgence to the debtor.² But where the bill or note has been accepted for honour by a third party, or has reference to a third party in case of need, and has been protested for non-payment, presentment to the acceptor for honour does not require to be made till the day following that on which the bill fell due; and, if the address, on the bill, of the acceptor for honour be elsewhere than in the town or place where the bill is payable, the bill does not require to be forwarded, for presentment for payment, to the acceptor for honour till such day after it is due.³ If the last day of grace be a Sunday or holiday, the presentment must be on the day before; the day after will be too late.⁴

PLACE OF
PRESENTMENT.

We have now to consider as to the place of presentment for payment when the bill arrives at maturity. And first, I take the case of a bill or note in all respects complete, and which names the place of payment. If such place is embodied in the bill or note, or printed or engraved at the bottom of it, in either of these cases, being inserted before the completion of the note, it forms part of the note. It is then part of the transaction that payment is to be made at the place so pointed out, and presentment for payment must take place accordingly. The specification of the place merely in the acceptance, or only in a memorandum annexed to acceptance, and in writing, has not equal effects, but payment ought to be asked for at the place there pointed out; and, if the memorandum says that payment is to be made by a particular person, it ought to be sought of such person, although he does not happen to be a party to the bill or note. If, however, the acceptance merely names a place of payment, it is deemed what is called a general acceptance, which means that the acceptor will be liable, though presentment be not made at the place specified. But if the acceptor, besides naming a place, adds the word 'only,' or the words 'and not otherwise or elsewhere,' that is a qualified acceptance, and presentment must be made at the place named (1 & 2 Geo. IV. cap. 78); and the Act has been held to apply where the place of presentment has been so named by the drawer, and not by the acceptor. In these cases

¹ 12 Geo. III. c. 72, s. 41; Cruickshanks, 17th June 1748, M. 1576; Fergusson & Co., 17th June 1803, M. App., Bill, No. 13; 1 Bell's Comm. 411, note 6.

² Brown, 2 Macph. 1143.

³ 6 & 7 Will. IV. c. 58, s. 1.

⁴ Smith and Payne, 29th June 1786, M. 1612.

due presentment at the place named is necessary, otherwise the claim against the acceptor of a bill will be lost. It is a qualified acceptance.

If there is no specification of place at all, Mr. Thomson¹ seems to think that the debtor is bound to pay to the creditor, when he is payee in the bill or note, wherever he may be; and that the payee, being creditor, fulfils his part by simply receiving and discharging the debt. But Chitty² says that the holder should perhaps be required to present to the debtor, before being entitled to sue or do diligence. And this rule holds in practice, it being usual for the holder, even when payee, to apply for payment; the place, where none is specified, being where the debtor is personally, if he is an individual, and can be found; if he cannot be found, then his ordinary residence, or, if he is in trade, his place of business, or, in the case of a company, their place of business. If neither can the acceptor be found, nor is his place of residence known, it does not appear to be clearly settled what course should be taken. In England the rule is, that in such case due diligence must be used to discover him; and the question, what is due diligence, is for a jury. In the Juridical Styles³ it is suggested that, in such case, the place of protest (which is the same thing as the place of presentment) should be the exchange and market cross (of what place is not said). When a protest was taken at the head burgh of the county of the debtor's last residence, the protest seems to have been considered inept; but it does not appear that the party had left the country, or that any attempt was made to find him personally. Perhaps, therefore, he might have been personally applied to.⁴ If the party is abroad, the Style Book says the protest should be taken at the market cross of Edinburgh, and pier and shore of Leith. This was suggested after the passing of the Act 6 Geo. IV. cap. 120, which, by sect. 51, required edictal citations to be made at the Record Office of the Keeper of the Records of the Court of Session; an enactment which the compilers of the Styles had in view, and of which they doubt the application to protests. Mr. Thomson⁵ says, 'perhaps it should be at the debtor's last residence;' and Professor Menzies suggests both courses,⁶ *ob majorem cautelam*. The case is one of great practical difficulty, illustrating the importance of having the place of payment specified in the bill or note. As to the course to be followed, I do not feel authorized to offer a direction. When a bill or note is presented for payment, it should be in such a condition that delivery to the proper debtor will operate discharge; or the party who presents the bill or note for payment should be one entitled to grant a valid discharge to the debtor.

When a bill or note is dishonoured, that is, when it is not accepted on presentment for acceptance, or is not paid when due, and presented for payment,—the holder, as a general rule, requires to prove due pre-

¹ Thomson, p. 384.

² Chitty on Bills, p. 392.

³ Style Book, ii. 14.

⁴ Glendinning's Creditors, 14th June 1745, M. 1449.

⁵ Thomson, p. 453. ⁶ Menzies, p. 358.

PROTEST. sentment and dishonour by competent evidence; otherwise he will lose his right of recourse against the drawer of a bill, and the indorser of a bill or promissory-note. As a general rule, an instrument of protest was formerly required in all cases, in order to prove the presentment and dishonour; but by the Mercantile Law Amendment Act, sect. 13, it is declared sufficient to prove the fact, in the case of an inland bill or promissory-note, by other competent evidence, written or parole. The Act makes no change in the law respecting foreign bills, as to which notarial protest is equally necessary now as formerly, for preserving recourse.

**EFFECT OF
FAILURE IN
NEGOTIATION.**

As a general rule, failure in due negotiation of the bill or note when payable, including failure to protest in the case of a foreign bill, operates the liberation of the drawer and indorsers.¹ It is no excuse for undue negotiation, that the drawee, or maker, or acceptor, had been gazetted as a bankrupt, before the bill fell due.² And the liberation of the drawer and indorsers is likewise the result, as a general rule, when, notwithstanding due negotiation, either for acceptance or payment, due notice of dishonour is not given to the drawer and indorsers.

NOTICE.

The purpose of the notice is to give these parties opportunity of securing themselves by recurring against the persons liable to them respectively, on the bill or note; and in *Calder's case*, where the acceptor had become bankrupt, the Court held that no inquiry could be allowed into the amount of the damages which might have arisen to an indorser, in consequence of the want of notice of dishonour to him. The right of recourse against him was held to be absolutely lost.

Inland and foreign bills were formerly on a somewhat different footing as regarded notice. But by the Mercantile Law Amendment Act, sect. 14, it is provided that, in order to preserve the holder's recourse, notice of the dishonour of an inland bill or note, by refusal to accept or pay, shall be given in the same manner, and within the same time, as is required in the case of foreign bills by the law of Scotland. On that point there does not seem to be any definite rule established by practice in Scotland; but in England the rule appears to be, that notice of the dishonour shall be given, at latest, the day after the dishonour.

When there are several indorsers entitled, in their order of liability, to notice, the holder will preserve his recourse against the last indorser, by merely giving notice to him; and such last indorser again will preserve his recourse against his immediate prior indorser by notice to him alone, and so forth; the notice by each indorsee to the prior indorser requiring to be given, at latest, by the post of the day after that on which he himself receives notice, or is aware of the dishonour. But if the day after the receipt of the notice be a Sunday, or a day on which the party is forbidden by his religion to attend to secular affairs, he is

¹ *Fergusson & Co.*, 19th Jan. 1799, M. App. Bill, No. 13; *Henderson*, 24th Nov. 1829, 8 Sh. 121.

² *Langley*, 17th June 1748, M. 1574; *Calder*, 22d Dec. 1808, F. C.

not bound to send notice till the day following. Such notices as I have spoken of will fully preserve recourse, when all are duly given. But supposing that the last indorser shall fail to give notice to the one preceding, or he to his prior indorser, and so forth, recourse will be lost as against those parties who are entitled to notice, and who do not get it. The safe course, therefore, is for the holder to give notice to all concerned, and for each party, not ultimately liable, to give notice, not only to his immediate prior indorser, but to all those liable before him. But if the holder has given notice to all concerned, and one of the immediate indorsers pays to him, the party so paying acquires the benefit of the holder's notice, to the same effect as if he had given it himself.

I have mentioned that even the acceptor of a bill is liberated, if the bill, being payable at a particular place 'only,' or payable at a particular place, 'and not otherwise or elsewhere,' is not duly presented at the said place for payment. Such acceptance is qualified, and the condition or qualification must be purified in order to preserve the obligation undertaken by the acceptor. But, except in that case, it is a general rule that the acceptor of a bill, and the maker of a promissory-note, remain liable to the holder, although due negotiation does not take place, or notice of dishonour shall not be given; because, as a general rule, the bill or note is the proper unqualified debt of the acceptor or maker, who has no right of recourse against any one else. He therefore suffers no loss by delay or neglect to apply for payment, or to give notice of dishonour, of which he is, or ought to be, aware without notice.

ACCEPTOR NOT
ENTITLED TO
NOTICE.

The general rules requiring strict negotiation, and notice of dishonour, are, however, subject to exception in particular circumstances.

EXCEPTIONS
FROM GENERAL
RULES AS TO
NEGOTIATION.

1. We had formerly occasion to remark that a promissory-note, payable on demand, but which was considered rather as the voucher for a loan than as containing a remittance, was held duly negotiated, though not presented for payment until about five and a half months after its date.¹ And the holder of a promissory-note, payable one day after date, was found not liable in strict negotiation, but entitled to sue the indorser as well as the granter, two years after the date of payment, although there had been no protest or notice.²

2. In regard to bills remitted from foreign parts, and which the payee or indorsee does not receive till the term of payment is past, the rules of strict negotiation cannot literally apply; but it is the duty of the payee or indorsee, as soon as such bills come into his hands, to demand immediate payment, and to protest in case of non-payment.³ He ought also to give immediate notice in case of dishonour; and I apprehend that, in such cases, the rules regarding notice in case of dishonour would be similar to those in the ordinary case of bills presented for payment at maturity and then dishonoured; the time with reference

¹ Leith Banking Company, 14 Sh. 332.

² Jamieson, 12th Feb. 1819, Hume 69.

³ Young, 29th June 1749, M. 1580.

to which the question would be settled, whether due notice had been given or not of the dishonour of the bills, overdue when they came into the hands of the payee or indorsee, being the date at which such overdue bills or notes came into his hands.

3. The general rule applicable to drawers and indorsers further suffers exception when these parties are the proper debtors, because the proper debtor has no interest in requiring notice, from any one, of the dishonour which he himself has occasioned.¹ On the same principle, the obligants in a bill, liable in relief to each other, are not entitled to insist for due negotiation in questions with each other.²

4. Moreover, the right to notice of dishonour may be waived, not only by express agreement, but likewise by the party's actings. Thus, where the indorsee, with consent of the indorser, entered into a composition-contract with the granter of a promissory-note, whilst the note was current, the necessity of negotiation of the note at maturity was held to have been waived.³ And where the drawer himself, at whose request and on whose security a loan had been made, induced the holder to delay presenting the bill when due, such drawer was found liable, notwithstanding the omission to negotiate so caused.⁴

KNOWLEDGE OF
DISHONOUR.

5. Again, when the party is aware of the fact of dishonour, he is not entitled to notice; which is requisite not as a solemnity, but only for information.⁵ And, when the acceptor has no funds of the drawer, the holder will not lose his recourse against the drawer by the want of negotiation.⁶ The drawer, in that case, suffers no damage through the want of notice.

The case of the indorsers is different. In general they know nothing of the state of accounts between the drawers and acceptors, and, without notice, cannot be aware of dishonour, or be in a situation to take measures for their own relief; and they will accordingly be liberated by want of notice, even when they know the bill to be for mere accommodation of the drawer.⁷ And where the bill was made for the acceptor's accommodation,—he having 'got value from a third party through the interposition of the drawer,'—recourse against the drawer was held to be lost by want of notice to him. In that case he had his recourse against the acceptor, and was entitled to notice, just as the drawer or indorser in an ordinary case. The acceptor was the proper debtor.⁸

On this subject I may further notice, that the failure to negotiate, and consequent loss of recourse, will operate the release of any party bound by way of guarantee, or as cautioner, for the payment of the bill; because such parties, when they pay the bill, are entitled to be placed in the full right of the debt, with all the obligations and securities for payment to

¹ Macadam, 14th June 1787, M. 1613.

² Jarron, 17th June 1803, M. App. Bill, No. 14.

³ Watson, 10th March 1824, 2 Sh. 782.

⁴ Cairns' Trustees, 23d June 1836, 14 Sh. 999.

⁵ Davidson, 25th Feb. 1791, Hume, 34.

⁶ Littlejohn, 12th Dec. 1746, M. 1569; Hill, 5th June 1805, M. App. Bill, No. 18.

⁷ Orr, 19th June 1792, Hume, 36.

⁸ Goldsmid, 26th May 1814, F. C., and Hume, 37.

which their principal was entitled; and are not bound to pay, if any of these obligations or securities is lost.

The notice should be given by letter, correctly addressed, booked, and despatched by post; and it must be explicit in its terms, specifying the bill or note by its date, sum, and other particulars. It ought to be so special as to put an indorser in safety to proceed to give notice to those upon whom he has himself the right of recourse. A letter, intimating that the writer had drawn upon the indorser for £150 'for retiring a bill of his in A. B.'s hands,' for the same sum, was held not enough.² It is not indispensable that the notice shall be in writing; evidence, *prout de jure*, that the fact was duly communicated, was found enough.³ But if notice, duly addressed, is despatched by the post, it is enough to exonerate the holder, though it shall not be duly received;⁴ and reasonable proof of the due despatch of notice by letters will be accepted as sufficient.⁵ The notice, however, must be correctly addressed. A letter from Castle Douglas, addressed to 'William Milligan, Trench,' a village close to Dumfries, while the party's residence was at Stoop, another village in the immediate neighbourhood of Dumfries,—which was the post-town of both villages,—was held insufficient.⁶ But a correct address will be presumed, if the contrary be not proved.⁷ Proof of despatch by a carrier will not suffice. In that case the delivery must be proved.⁸ I suppose that in these days notices by carriers may be held as obsolete.

GIVING OF
NOTICE.

CHAPTER V.

WE now come to the subject of the Notarial Instrument of Protest for non-acceptance of bills, or non-payment of bills or notes. Such protest is necessary with a view to summary diligence in all cases; and as regards foreign bills it is necessary also in negotiation—the Mercantile Law Amendment Act making protest unnecessary only as connected with negotiation in the case of inland bills and notes.

NOTARIAL
PROTEST.

The protest assumes that a party, on behalf of the holder of the bill or note, or, in the case of a note sent to an agent to get it accepted, that such agent, accompanied by the notary-public and two witnesses, proceed to the place where the bill is presentable for acceptance or payment;

¹ Alexander, 28th Nov. 1827, 6 Sh. 150.

² Johnston, 21st July 1747, M. 1570.

³ Mill, 12th Nov. 1805; Hume, 54; Syme, 25th June 1813, F. C.

⁴ Henderson, 19th Jan. 1799, M. App. Bill, No. 7; Stewart, 13th Dec. 1821, 1 Sh. 213.

⁵ Galbraith, 5th Feb. 1820, Hume, 79; Sandeman & Miller, 12th Nov. 1831, 10 Sh. 4. See also, on this point, Stock, 14th Nov. 1846, 9 D. 75.

⁶ Milligan, 27th Feb. 1829, 7 Sh. 489.

⁷ Robertson, 12th Dec. 1835, 14 Sh. 139.

⁸ Brown, 14th June 1809, Hume, 62.

that a demand for acceptance or payment is duly made, and is refused; and thereupon, that is, at the place before indicated, and (it may or may not be) in presence of the drawee, or acceptor, or granter, that the bill or note is protested by the notary at the instance of the payee, or of the agent, against the drawee, for non-acceptance, in the case of an unaccepted bill; or at the instance of the holder in the case of an accepted bill or a promissory-note, against the acceptor or granter for non-payment; and, in either case, against the drawer and the indorsers, if there are any, jointly and severally, for recourse, and against all concerned, for interest, damages, and expenses, as accords of law; all in presence of the witnesses. In the case of a foreign bill, including that of a bill between Scotland and England, or Ireland, the protest will further be for exchange, and re-exchange, and charges; that is, the loss and expense arising by having to transmit money from one place to another, to supply the want of the sum payable under the bill or note.

NOTING
PROTEST.

When a bill has not been accepted, the protest for non-payment will take notice of that for non-acceptance, according to the form given in the Juridical Styles.¹ I have said that the protest assumes all the above procedure to take place. In point of fact, the presentment of the bill or note is made simply by an individual employed on the part of the payee, or agent, or holder; in the case of banks, by one of their ordinary messengers, without the attendance of any notary or witnesses. The presenter reports the non-acceptance or non-payment to the notary, who immediately 'notes' the bill or note; that is, makes a written note or memorandum, somewhere on the bill or note, of the date, which, in case of non-acceptance, will be the date of presentment and refusal to accept, whatever that may be, and, in case of non-payment, the last day of grace; then he writes the initial letters of his own name, and 'N. P.' after them, with a memorandum of the witnesses' names and designations, as the materials from which to complete an instrument of protest, in due form, if required. Though the notary and witnesses do not actually attend at the presentment, I apprehend that they ought to be at or within reach of the place, as at the time of presentment. The notary usually names the witnesses at his discretion; and the mode of procedure in regard to protesting bills, as now stated, I believe to be almost invariable. It was recognised as universal in London, in the case of Stevenson,² and as having been the practice of all the notaries in Glasgow but one, in the case of Macartney,³ in both of which cases protests so taken were sustained by the Court.

INSTRUMENT
OF PROTEST.

The notary may write out his full instrument of protest at once; and generally he will do so in the case of foreign bills, at least after these have been presented for payment and dishonoured. As regards inland bills, he usually delays writing out the protest until diligence is to be done. He will then, from the materials contained in his 'note,' extend

¹ Style Book, ii. 18.

² Stevenson, 14th Nov. 1764, M. 1518,

³ Macartney, 11th Feb. 1817, Hume, 76. & 1593.

the instrument; which, in order to summary diligence, he must do before six months expire from the date of the bill, in case of protest for non-acceptance, and from the date when the bill or note fell due, in case of protest for non-payment; because, in order to warrant summary diligence, the instrument of protest requires to be registered within six months from these dates, respectively, in these cases. But, where the 'note' contained sufficient materials for the protest, the instrument was sustained when made out after the lapse of fifteen years.¹ And Professor Menzies² holds that, if the materials are sufficient, the instrument of protest may be extended at any time within forty years from its date. The materials preserved by the notary, however, must amount to authentic evidence, otherwise his instrument will not be held as proof of the protest. In the case of Barbour,³ an instrument of protest of two bills, written on one stamp, was not admitted as affording evidence on which, at an interval of twelve years, to write out a new instrument on the proper stamp. But, in the later case of Balfour,⁴ a similar objection to a notarial instrument of intimation of an assignation was rejected, and the unstamped document was sustained as a memorandum; a judgment which Professor Menzies would evidently hold as an authority in support of the protest of a bill, as well as of an ordinary notarial instrument of intimation.

Protest for non-acceptance may be at the instance of the person having custody of the bill at the time. Protest for non-payment may be made at the request of any one acting for the holder of the bill; the notary being bound to satisfy himself that the party making the request is the holder, or one possessing his authority. But it is not necessary that the name of the holder should appear *ex facie* of the protest, provided he be sufficiently described otherwise. For example, 'the Manager of the Union Bank of London' was found sufficient as a description.⁵ A notary cannot protest a bill of which he is himself the drawer and indorser. He cannot, himself, certify the fact which is to be the foundation of his own recourse.⁶ Nor can the acceptor act as notary in protesting, at the instance of the holder, against the drawer, and indorser, and himself.⁷ And the Court expressed an opinion that it was irregular, and unsuitable, for the managing partner of a bank to act as notary-public in protesting bills at the instance of the bank; although they did not conceive that a mere stock-holder would be disqualified.⁸ It has been found, however, not a good objection to a protest, that the notary had formerly been a partner of the drawer, the partnership having actually terminated before the protest was taken,—though the dissolution had not been sufficiently notified.⁹ And it is not a sufficient objection that the notary is the son of the creditor in the bill.¹⁰

WHO MAY PRO-
TEST A BILL.

¹ Alexander, 28th November 1827, 6 Sh. 150.

² Menzies, p. 367.

³ Barbour, 23d March 1823, 2 Sh. 328.

⁴ Balfour, 21st July 1832, 10 Sh. 853.

⁵ Elder, 15th Nov. 1854, 17 D. 56.

⁶ Leith Banking Co., 22d Jan. 1836, 14 Sh. 332.

⁷ Russell, 27th Nov. 1827, 6 Sh. 133.

⁸ Farries, 9th June 1813, F. C.

⁹ Mackenzie, 23d Nov. 1830, 9 Sh. 52.

¹⁰ Reid, 19th Nov. 1830, 9 Sh. 31.

STAMP. Care must be taken to employ the proper stamp. It is not allowable to include, in one instrument, the protests applicable to more than one bill.¹ But after a judgment, founded on, *inter alia*, a protest of two bills on one stamp, has become final, and has been extracted, the protest having been duly in process, and the objection not discovered or not taken, the Court will not allow suspension of a charge on the decree, on the ground that the protest is not duly stamped.² In the suspension, the protest is not before the Court. The suspension is of a charge on the decree, which is *ex facie* regular in all respects; and in that process, therefore, the Court cannot reach the objection on the Stamp Laws.

The protest is held to be taken at the place of presentment, but it is not necessary to specify the place in the instrument. It is enough to say that the bill was 'duly protested;' these words, supported as they are by practice, being held as inferring that the protest was taken with all the solemnities required by law.³ Again, where a bill was payable at 'the bank office in Dundee,' where there were several banks, application was made for payment at them all, and the protest bore that it was 'where payable duly protested.' This was challenged as indefinite, but sustained.⁴ But, if it is actually stated that presentment was made, and the protest taken at a wrong place, that allegation is relevant, if proved, to nullify the protest and diligence upon it.⁵ And, if the notary proceeds on wrong information as to the presentment,—and there has been truly no presentment,—the party who has failed to present is liable for the consequences.⁶

**ACCEPTANCE
FOR HONOUR.**

Instruments of protest require to have a full copy of the bill or note prefixed, exhibiting *verbatim* the terms of the document, with its indorsements, if any. And, where the acceptance is 'for honour,' there is, in the first place, the protest in usual terms, at the instance of the agent, or of the holder, for non-acceptance by the drawee; and then what is called the 'act of honour,' in which the drawee, if he has declined to accept *simpliciter*, says that, though he has so declined, he will accept for honour, and on account of the party named, and protests that such party, and all those liable to such party, shall be bound to him, the drawee, for reimbursement, in due form of law. When a third party accepts for honour, he also says the same thing, except, of course, that he makes no reference to having declined to accept *simpliciter*. If payment is made for honour, the third party interposing offers to pay for honour, and on account of his friend, whoever he may be. And, having paid accordingly, he protests that his friend, and all the parties liable to such friend, shall remain, jointly and severally, bound to him, the payer, in like manner as they had been to the holder. The party paying does not come into the full place of the holder as an ordinary indorsee or assignee.

¹ Napier, 17th Jan. 1824, 2 Sh. 622.

² Sequel to case of Napier, 7th Feb. 1828, 6 Sh. 500.

³ Commercial Bank, 24th Feb. 1818, F. C.

⁴ Gordon, 28th November 1845, 8 D. 146.

⁵ Stocks, 23d Nov. 1822, 2 Sh. 35.

⁶ Houldsworth, 19th Dec. 1850, 13 D. 376.

He has a claim to reimbursement from the person for whom he interposes, and, in other respects, takes the place of that person.

The protest, in all cases, bears to be taken in presence of two witnesses, who are fully named and designed in the instrument, but do not sign. The authentication consists exclusively of the notary's subscription, to which he prefixes his motto, and annexes the initial letters of his official character, '*N. P.*'

Summary diligence, on a charge of six days, is authorized in virtue of instruments of protest, having the bills prefixed, and duly registered, by the Scots Acts 1681, cap. 20, applicable to foreign bills; and 1696, cap. 36, to inland bills; and the British Act, 12 Geo. III. cap. 72, sect. 42, made perpetual by 23 Geo. III. cap. 18, sect. 55, as to promissory-notes. The first of these Acts is applicable solely to foreign bills, as to which it authorizes decree and warrant for diligence in virtue of a registered protest, having copy of the bill prefixed,—in like manner as if there had been a formal consent to registration for such decree and diligence; the same to be, in case of non-acceptance, against the drawer and indorser, and, in case of non-payment, against the acceptor. The second Act places inland bills on the same footing with foreign bills, in all respects, as to the above particulars. And the Acts of Geo. III. place promissory-notes on the same footing with bills, in all respects; and authorize summary diligence on bills, inland and foreign, and promissory-notes, not only against the acceptors and granters, but also against the drawers and indorsers, jointly and severally,—excepting when the indorsations are without recourse.

In general, such diligence is competent only at the instance of the party by whom the protest is taken. A party, paying upon act of honour, but who was not previously a party to the bill or note, does not appear to have the privilege of summary diligence at his own instance, without having the bill or note previously transferred to him.¹ But payment is frequently made to the party at whose instance the bill has been noted or protested; and where that is done by a previous indorser, before the instrument of protest is extended, the indorser so paying can get the protest extended in his own name.² Whether such a course is allowable when the party making payment is not an indorser, or previously connected with the bill, was questioned, but not decided, in the case of Allan.³ But, even after the protest has been extended, if payment is made by a party liable as drawer (being also payee) or indorser to the protester,—but not ultimately liable as the proper debtor,—such party can obtain a receipt from the protester, written on the protest, and thereupon, on special application in the Bill-Chamber, the Court of Session will authorize registration of the protest, and warrant thereon for summary diligence, at the instance of the party who so made payment, against those liable to him.⁴ The report of Herries' case bears the application to have stated that this was 'according to the practice in such cases;'

¹ Style Book, iii. 589, note 2.

² Mackie, 15th June 1822, 1 Sh. 499.

³ Allan, 5th June 1829, 7 Sh. 706.

⁴ Herries, 5th Jan. 1745, M. 1509.

but you will observe that in such case a special application to the Court is necessary. The party so paying can obtain diligence in his own name only on such application.

**RECEIPT TO
INDORSEE.**

An indorsee paying to the protesting indorsee has a more simple remedy, by the Act 12 Geo. III. cap. 72, sect. 43, which declares summary diligence competent to the indorsee of a bill, though the protest is not in his name, and though the bill is not reconveyed to him by indorsation, if he produces a receipt for the value, by act of honour, or a letter from the protesting indorsee mentioning the dishonour, agreeably to the practice of merchants in returned bills. The Act gives the privilege to the indorsee; but we have seen that the payee and indorser had previously the same privilege, on special application; which Mr. Thomson¹ considers to be founded on the words of the Act of 1681, authorizing diligence at the instance of the holder or his order. Certainly the Act of Geo. III. was not intended to restrict the rights previously existing; and indorsers paying to the protesting holder have, in practice, been allowed the privilege here specially given to indorsees. So also have payees, who are substantially indorsees of the drawers. Drawers, not being payees, however, have not the privilege. They can acquire only by indorsation or assignment; and I apprehend they cannot register, in their own names, the protests taken by others.

The Act of 12 Geo. III., in the 43d section, confers the privilege now explained on the indorsees of bills only; but, by sect. 36, indorsees of promissory-notes are declared to have the same privileges as the indorsees of bills in all points. It is open, therefore, to the indorsees of promissory-notes to acquire right to protests from the protesting indorsees by mere receipt. And the privilege has been held to extend to the payees of promissory-notes; they being held in the same situation as the indorsees of bills.² But the privilege is statutory, and is not available unless the forms of the Act be carefully observed. In particular, the receipt must be from the holder (the party at whose instance the instrument of protest has been taken), and must be so framed as clearly to show that it is from the right party. When the protest was at the instance of the treasurer of a bank, and the receipt bore to be granted by A. B., 'agent,' summary diligence, raised at the instance of the party who had paid the bank (through the agent), was found null.³ There was nothing to connect the agent with the protesting holder; and you will recollect that, in order to summary diligence, the warrants must always be complete in themselves, and independent of extrinsic evidence for establishing their sufficiency or regularity.

**REGISTRATION
OF PROTEST.**

The protest, being duly taken, and having the copy bill or note prefixed, and the act of honour, or receipt from the protesting holder, if there are such, annexed, requires to be registered in the books of a competent Court of Justice within six months,—reckoned from the date of the bill in

¹ Thomson, p. 565.

³ Summers, 16th December 1843, 6 D.

² Kennedy, 26th June 1849, 11 D. 1198. 286.

case of non-acceptance, and from the date when the bill fell due in the case of non-payment. And the notary's copy of the bill, prefixed to the protest, is not received by the registrar as sufficient evidence of the terms of the bill. The principal bill must be produced on presentment of the protest for registration, that the registrar may compare it with the copy. The object of the production, however, is merely to instruct the accuracy of the notary's copy. The principal bill ought not to be left in the hands of the registrar. It should be returned to the party immediately after comparison, and kept by him. And registration cannot be allowed after the six months, reckoned as above, are expired, even though the delay shall have been wholly unavoidable. It is a statutory privilege, giving equal rights with registration on express clause of consent, but there is no actual consent, and the Court have no power to supplement the Statute. It was so found in a case where registration during the six months had been prevented by interdict.¹ But, though registration is allowed, in the case of non-payment, only during six months after the bill or note falls due, a bill or note payable on demand is not held to fall due till the demand is made. Therefore, in such case, the six months allowed for registration run, not from the date of the bill or note, but from the date of the demand.² On the other hand, a bill payable at sight, and accepted without dating the acceptance, is held to be payable at the date of the bill itself; and the protest thereof must be registered within six months from the date of the bill.³

The instrument of protest being duly registered, a decree of registra- DECREE.
tion will be interponed, and an official extract of the protest and decree will be given out, under the hand of the clerk of Court, or other authorized person, which, in terms of the Personal Diligence Act,⁴ will contain a warrant to messengers-at-arms to charge the obligants to make payment within six days after service. The warrant likewise authorizes arrestment and pouncing,—the latter only after the *induciae* of the charge to pay have expired.

And here I may notice that protest, in the English form, of a bill, is ENGLISH
a good ground on which to obtain decree of registration, and to raise PROTEST.
summary diligence in Scotland, assuming the protest to be made according to the English usages.⁵ Moreover, a domiciled Scotchman who accepts a bill in England is liable to summary diligence on his acceptance, according to the law of Scotland, as being the country where the document is to be enforced against him.⁶ And summary diligence is competent against a party resident in Scotland, in virtue of a bill neither drawn, nor accepted, nor payable in Scotland; for, though in such matters the construction of the contract, as regards the rights which it creates, depends on the *lex loci contractus*, the modes or forms of exe-

¹ North British Bank, 18th July 1848, 10 D. 1505.

² Bon, 21st Feb. 1846, 12 D. 1310; M'Rostie, 16th Nov. 1849, 12 D. 124.

³ Moffat, 31st Jan. 1838, 16 Sh. 406.

⁴ 1 & 2 Vict. c. 114, s. 1.

⁵ Elder, 15th Nov. 1854, 17 D. 58.

⁶ Don, 13th June 1850, 12 D. 1016.

cution, the legal remedies for enforcing implement of these rights, must be those of the place where implement is sought.¹

RECEIPT TO IN-
DORSEE AFTER
REGISTRATION.

The receipt from the protesting indorsee to a prior indorsee does not enable the prior indorsee to obtain warrant for diligence in his own name, if granted after the protest is registered. The registration introduces a decree of Court, and warrant of diligence, at the instance of the party obtaining such decree, which are not transferred by virtue of a mere receipt, the statutory privilege being expressly applicable to cases in which registration has not taken place. In some circumstances it may answer to expedite a new protest in the name of the party paying, on which he can obtain decree of registration and warrant of diligence at his own instance.² Formerly it was held competent for an indorsee, who paid to the last indorsee, after registration of the protest, to obtain letters of horning in his own name, in virtue of the recorded protest, with receipt from the protester, the receipt being held to operate as an implied assignation.³ On this point Professor Menzies says,⁴— ‘According to the principle of that decision’ (in Scott’s case), ‘an indorser, paying upon a receipt by the protesting indorsee, would appear to acquire right to the extract; and to be entitled now to obtain a fiat for diligence in his own name, under the 7th section of the Personal Diligence Act.’⁵ But, looking to the altered form of the decree under that enactment, the safer course would be to transfer by ‘a formal assignation.’ In that advice I entirely concur. The party, having obtained his assignation, would proceed in the way pointed out in the above section (7), applicable to the case of ordinary assignees, executors, or others acquiring right to bills or notes and registered protests. In virtue of the decree and warrant, obtained by registering the protest, or of the warrant, obtained in the form pointed out by the above Act, sect. 7, by an assignee, or other person acquiring right to the protest, diligence may be done against the debtor’s person and estate; but, as the procedure in such diligence is presently to engage our attention, as a subject by itself, I will not enter on it here.

CHAPTER VI.

ERASURES OR
ALTERATIONS
IN BILLS.

I WILL now notice the effect of erasures or alterations in bills and notes. And here there are objections of two separate classes to be kept in view:—(1.) At Common Law, it is not competent to make an alteration on a material part of a bill or note, without consent of all parties

¹ Thomson, p. 157; Mackenzie, 12th Dec. 1854, 17 D. 164.

² This course was followed in Freer, 18th Nov. 1806, M. App. Bill, No. 19.

Scott, 11th June 1816, Hume, 75.

⁴ Menzies, p. 378.

⁵ 1 & 2 Vict. c. 114.

concerned. The document, as altered, is not that which the parties subscribed. It no longer affords evidence of what it was originally; and parole proof as to the authority for the alteration, or on any other point, cannot, consistently with the law applicable to written obligations, be admitted. If, however, the bill or note has not been issued, alterations may be made with consent of all parties, duly proved in writing; provided always, of course, that such alterations are probative in themselves. But (2.) after the document has been issued it cannot be altered, even with such consent; because, as altered, it contains a new agreement, or a new obligation, requiring a fresh stamp.¹ The objections here referred to cannot be obviated by after-stamping. In order, however, that the alterations shall have the effect of rendering the bill or note null in the hands of an onerous *bond fide* third party—(1.) they must, if made before it is issued, not only be made without consent of the parties, but be so executed as to be discernible on a careful inspection of the document; or (2.) they must be made after the bill is issued; or (3.) they must be made without consent of the parties.

The first question here is, What are the material parts of the bill or note, as connected with the above point?

The most material part is the sum. Alterations on the sum, palpably made, vitiate the bill.² But where, in regard to another bill between the same parties, the alterations were so executed that a person, not previously aware of them, could not have discovered them, the bill, for its altered amount, was held good in the hands of an onerous holder.³ The case here referred to brings out forcibly the distinction, as regards the legal effect, of alterations, arising from the manner in which the alterations were made. The bill, which was sustained, had certain blanks in it, left by not writing over or drawing lines across the stamp, and the alterations were easily made in consequence. In these circumstances, it was observed on the Bench, that the acceptor must be held, in law, to have consented to the alterations, in the same manner as he would be presumed to have given a discretionary power to the drawer, in filling up the sum, if the blank had been total,—that is, if he had signed a skeleton bill. It was further observed, that, ‘as the loss must fall either on the onerous indorsee or on the acceptor, it must be borne by the acceptor, to whom a certain degree of negligence, in leaving the stamp blank, may be imputed.’ The other bill, which was not sustained, had a crowded and suspicious appearance, *ex facie*, and ought not to have been received as an authentic document. The same principles were applied in a subsequent case,⁴ where the sum in a bill was altered from £8 to £84, by merely filling up a blank space left in the bill. The bill was sustained for its full amount. But where an alteration of the sum from £60 to £160 was made so as, on a careful inspection, to occa-

MATERIAL
PARTS OF A BILL
OR NOTE :—
THE SUM.

¹ These points are fully established by the case of the Edinburgh & Glasgow Bank, 13th July 1858, 20 D. 1246.

² Grahame, 27th Jan. 1795, M. 1453.

³ Same case.

⁴ Pagan, 19th June 1793, M. 1660.

sion an 'awkward and crowded aspect' of the bill, *ex facie*, this was held to vitiate the bill.¹ In another case,² the sum was, after acceptance, altered from £24 to £26; and the acceptors, whose consent was not proved, were found not liable even for the original and admitted amount.

**RATE OF
INTEREST.**

An alteration on the rate of interest, originally expressed in the bill or note, is also material.³

**TERM OF
PAYMENT.**

Alterations on the term of payment are also material.⁴ In the case here noted, the bill (which was a renewal) was originally payable on demand, and was altered so as to be payable one day after date, in order to be made to bear interest. The Court of Session, in an action on the bill, gave judgment in favour of the holder; but the House of Lords reversed; the Lord Chancellor observing 'that the alteration of the bill (a voluntary, if not a criminal, act of the pursuer) had annihilated it.' A similar judgment was pronounced in another case,⁵ where, upon the report of a banker and engravers that a bill had been vitiated, by alteration, erasure, or otherwise, making the term of payment in 1825 in place of 1826, the Court suspended a charge without caution or consignment. But where a bill, dated in 1799, was, as first written, made payable at Martinmas 1780, nineteen years before it was granted, the substitution of the year 1800 was held not to be a vitiation, but an alteration made to correct a mere blunder.⁶

THE DATE.

The date also is a material part of the instrument; but here again a difference arises in questions with third parties, according as the alteration is palpable or not. In the case of Murchie,⁷ the date was altered from 7th June to 17th June, by the interpolation of the figure 1 before that of 7, originally written. Assuming the 7th June to be the true date, the bill had not been duly negotiated. The addition, admittedly, had an appearance different from that of the rest of the bill; and the diligence was suspended, though the bill was in the hands of an onerous holder.⁸ Where the day of the month was written on erasure, without the knowledge or consent of parties, the bill was reduced.⁹ Moreover, in a case where the figure 5 in the date (25th Dec. 1793) had been interfered with, though perhaps only retouched with fresh ink, the bill was held null.¹⁰ The date is a material part, even if the bill is payable on demand, and without reference to its date.¹¹ But when the alleged alteration consisted in making the date 14th March, in place of 4th March, and the document, *ex facie*, had no suspicious appearance, but

¹ Watson, 27th June 1798, Hume 42.

² M'Lean, 20th May 1834, 12 Sh. 613.

³ English case of Sutton, quoted by Thomson, p. 181.

⁴ Murdoch, Robertson, & Co., 26th Dec. 1801, Bell's Comm. i. 391.

⁵ Hamilton, 17th June 1825, 4 Sh. 102.

⁶ Henderson, 20th Feb. 1802, M. 17,059.

⁷ Murchie, 1st July 1796, M. 1458.

⁸ See also Allan, 5th March 1800, M. App. Bill, No. 10, in which, because of an alteration in the date, made in order to save the bill from prescription, the bill was found inadmissible as evidence of a debt.

⁹ Armstrong, 2d June 1842, 4 D. 1347.

¹⁰ Hamilton, 1st Dec. 1824, 3 Sh. 345.

¹¹ M'Rostie, 2d March 1850, 12 D. 816.

looked unexceptionable, a bill of suspension was refused.¹ Lord Gillies said, if the bill had been *ex facie* vitiated, the case would have been different.

Alterations in regard to the names of the parties, or affecting their position and rights *inter se*, are also material. Thus, where a name, written below that of the acceptor, was erased, it might have been the name of a joint acceptor, and the Court refused to allow action on the bill.² The name of one of two drawers, who was also an indorser, being delete, although only by a mistake, the bill was held to be extinguished, because the alteration affected the question of relief and recourse between these two parties.³ The correction of the Christian name of a special indorsee, from William to Thomas, made by the indorsee himself, who was the holder, was found to deprive the bill of the privilege of summary diligence, reserving to the holder to claim in an ordinary action.⁴ But, where an onerous indorsee and holder had, through ignorance, written his name on the face of the bill (above the signature of the drawer), and scored out his subscription, the Court held this merely an innocent blunder, and that it did not vitiate the document.⁵ Again, where erroneous addresses or designations were written under the subscriptions of the indorsers, and copied into the protest, and registered as part of it, the deletion of these additions was held not to affect the bill as a ground of summary diligence. They were not in the handwriting of the indorsers, and were considered immaterial, as not being *in substantialibus*.⁶

Where one of two acceptors wrote the word 'cautioner' as an addition to his subscription, and that word was delete, and the words 'conjunctly and severally,' as applicable to the subscription of the two acceptors, were introduced, the cautioner was held released. To an onerous *bona fide* holder it would have made no difference whether the bill had stood in its original or altered form; but the right of relief competent to the cautioner against his own principal debtor, in a question *inter se*, would have been cut off if the bill had been sustained as altered.⁷ But the mere addition of the words 'jointly and severally' on a Scotch bill is immaterial, the liability being joint and several with or without them.⁸ In England where the legal liability is different, and these words are necessary to make each of two or more obligants in a bill or note liable *in solidum*, the unauthorized addition of the words would vitiate the bill or note.⁹

It is held, in England, to be a material alteration, to insert a specific consideration in a bill or note, granted at first generally, for value re-

¹ Stewart, 14th Nov. 1822, 2 Sh. 13.

² M'Ewen, 21st November 1833, 12 Sh. 110.

³ Callender, 10th Dec. 1812, F. C.

⁴ M'Ara, 3d June 1823, 2 Sh. 360.

⁵ Mill, 16th Jan. 1810, F. C.

⁶ King, 23d November 1841, 4 D. 62;

affirmed 11th May 1843, 2 Bell's App. 81.

⁷ Robertson, 27th May 1825, 4 Sh. 40.

⁸ Gordon, 20th January 1761, M. 14,677.

⁹ Case of Perring, quoted by Thomson, p. 184.

ceived.¹ But when, in a promissory-note, originally for 'value in trust-accounts,' the name of the truster was added, the Court held the bill not to be thereby vitiated, although the alteration was made after the bill was issued.²

PLACE OF
PAYMENT.

It is likewise held, in England, to be material to change the place of payment mentioned in the acceptance, so as to substitute a solvent for an insolvent house. An alteration of that nature was held by the twelve Judges, in England, to amount to forgery.³ But where the place of payment of a bill was thought to be sufficiently expressed, without reading part of it which was written upon an erasure, the Court held the erasure immaterial, and refused to suspend the diligence on the ground of the erasure.⁴ The place of payment, as in the bill before the Court, was 'The Leith Company's Banking Office, Dalkeith,' and the word 'Leith' was written on erasure. There was one other bank in Dalkeith at the time (the Commercial), which was not alleged to have been the place of payment originally. Neither was any damage alleged to have been sustained. The bill, however, was sustained only by the vote of the Lord Ordinary, called in, in consequence of the Inner House Judges being equally divided; and the case is hardly to be relied on as an authority, even to the limited extent to which it goes. In a case where two receipts for partial payments, written on the back of a bill, were delete, the deletion was held to form no defence against an action on the bill, for the balance admitted to be due. If the receipts were written by mistake, and delete afterwards, an action would probably be sustained on the bill for its full amount.⁵ The case of Lowe, however, suggests the expediency of taking the receipt for a partial payment separate from the bill, so that it may be delivered to the party paying. The payment should also be marked on the bill, the marking and receipt referring to each other.

It has been already mentioned, as connected with the Stamp Laws, that such alterations as constitute a new agreement or new obligation will render the bill or note null, if made after it is issued, and that this defect cannot be remedied. A bill accepted, whilst blank in the drawer's name, had been in that condition negotiated and in circulation; and the holder had signed his own name as drawer. Subsequently he deleted his own name, and got the party who had discounted the bill with him to sign as drawer, thus constituting a new obligation; and the Court held the bill null both at Common Law, and on the Stamp Acts, not merely as a warrant of summary diligence, but as a ground of action or document of debt.⁶ A promissory-note, altered in the date after delivery,

¹ Case of Knill, quoted by Thomson, p. 181.

² Commercial Bank, 28th June 1837, 15 Sh. 1202.

³ Case of the King v. Treble, quoted by Thomson, p. 182.

⁴ Beattie, 18th Feb. 1823, 2 Sh. 225.

⁵ Lowe, 10th Dec. 1825, 4 Sh. 299.

⁶ Fleming, 1st July 1823, 2 Sh. 446; and continuation, in name of Young's Trustees, 10th March 1831, 9 Sh. 574. This case corrects the earlier and exactly parallel case of Marr, 7th June 1806, Hume, 55; in which the objection on the Stamp Laws was not raised.

was held void;¹ and a promissory-note and bill were held null, in consequence of a new obligant having subscribed both, after they were issued as completed instruments.²

Alterations made with full consents, and before the bill or note is issued, do not vitiate the bill or note, even as a ground of summary diligence, assuming always that the stamp is appropriate to the bill as altered.³ And here the question occurs, at what time is a bill or note held to have been issued? It is so as soon as it is in the hands of a person entitled to enforce payment. For example—(1.) any indorsee; (2.) the drawer, if he is also the payee, and the bill has been accepted; a rule which holds, although such drawer has merely given a cross acceptance in exchange; (3.) the payee, or other holder, when the bill is drawn in favour of a third party. But it is not held issued if the drawer be the payee, and the bill is neither accepted nor indorsed; because, until indorsement by the drawer and payee (which implies transfer to a new party), or until acceptance, which implies an obligation in favour of the drawer, there is no concluded agreement conferring a right of action. And it lies on the party claiming on the bill or note, bearing an alteration, to prove that the alteration was made before issue.

ALTERATION
BEFORE ISSUE.

CHAPTER VII.

BILLS, as originally introduced, were merely mercantile instruments, intended to settle money claims arising in the course of trade; for which purpose, and as they were extensively employed in connexion with foreign trade, large and special privileges were conceded to them, particularly as regarded authentication. It would have seemed natural and consistent with these concessions that bills should, from the first, have had only a moderate term of endurance as documents of debt; and in England they were, with many other grounds of personal action, by 21 James I. cap. 16, declared to prescribe, if not sued on within six years. But in Scotland—not so early a mercantile country—we were, until a much later period, averse to so short a prescription. It was at one time proposed to limit bills to twenty years, on the principle applicable to holograph writings; but Sir George Mackenzie held that term too limited, and, with all their privileges, they continued subject only to the long prescription of forty years, down to the year 1772, when, by the Act 12 Geo. III. cap. 72 (made perpetual as to bills and notes by

PRESCRIPTION
OF BILLS AND
NOTES.

21 JAMES I.
c. 16.

12 GEO. III.
c. 72.

¹ Miller, M'Kay, & Co., 21st May 1835, 13 Sh. 813.

² Homes, 7th June 1836, 14 Sh. 898.

³ Laidlaw, 3d Aug. 1774, M. 16,941;

Fairweather, 12th February 1817, F. C.; Sutherland, 1st July 1823, 2 Sh. 442.

See also Whitehead, 19th Feb. 1836, 14 Sh. 544.

23 GEO. III.
c. 18, s. 55.

SIXENNIAL
PRESCRIPTION.

23 Geo. III. cap. 18, sect. 55), on the preamble, that the non-limitation of their endurance had been attended with great inconveniences, it was enacted, 'that no bill of exchange, or inland bill, or promissory-note, 'executed after 15th May 1772, should be of force, or effectual to produce any diligence or action in Scotland, unless such diligence should 'be raised and executed, or action commenced thereon, within six years 'after the terms at which the sums in the bills or notes became 'exigible.'

The first point for consideration, in the question whether a bill or note is prescribed, is the time from which the six years run; that is, the term at which the sum in the bill or note becomes exigible, and which is as follows; viz.,—In bills or notes payable on a day certain, or at a certain period after date, or after sight, or after demand,—the last of the days of grace.¹ When payable on demand, the time runs from the date of the bill, because the sum was exigible as on that day.² When payable at sight, it seems, as already noticed, to be a question whether days of grace are allowed. But the prescription does not begin to run till presentment, or till three days after, if days of grace are allowed in that case. When the last day of grace is a Sunday, or holiday, the prescription runs from the day preceding. But the years of the creditor's minority are not to be computed in the six years. (Sect. 40.)

INTERRUPTION
BY DILIGENCE.

To preserve the efficacy of a bill or note, after the lapse of the years of prescription, nothing short of diligence or action thereon will be sufficient. The following cases illustrate that position:—A party having died, leaving an appointment of trustees, an alleged creditor wrote that he had a claim to make; and, at the request of the trustees' agent, sent a statement of the claim, which was founded on a bill between two and three years overdue. No notice was taken of the matter for nine years, and, the debt being then claimed, the bill was held to be prescribed.³ The same was held, when, on a party's death, his trustees advertised for claims on his estate, and before the years of prescription were expired a claim on a bill was sent in, but no diligence was raised, nor was action commenced thereon, till the years of prescription had run.⁴ When there is diligence, it must not merely be raised, but executed. Prescription will not be stopped by letters of horning, without the execution of a charge.⁵

The registration of a protest produces by statute a decree of registration; but such registration does not stop prescription.⁶ There is here no diligence raised and executed. Registration, in the case of bills, was never more than a step to diligence; and the extract registered protest contains what is equivalent to letters of horning and warrant to

¹ Douglas, Heron, & Co., 19th Nov. 1793, M. 11,133; affirmed 11th Nov. 1796, 3 Paton's App. 503.

² Stephenson, 16th June 1807, M. App. Bill, 20; Bon, 21st Feb. 1846, 12 D. 1310.

³ Ewing, 12th Nov. 1835, 14 Sh. 1.

⁴ Hunter, 9th June 1831, 9 Sh. 703.

⁵ Armstrong, 16th May 1804, M. 11,140.

⁶ Douglas, Heron, & Co., 26th Nov. 1784, M. 11,127.

charge; but still it is no better than the decree followed by letters of horning was before; which, we have seen, did not stop prescription, unless the letters were executed. The diligence operating to stop prescription may be either personal, by charge of horning, or against the party's property by arrestment, poinding, or inhibition; but, in any case, it must be executed, as well as raised. Diligence on a Sheriff's precept will be equally effectual with diligence on warrant from the Supreme Court.¹ And, where the registered protest contained warrant to charge (as it did even in the old form when registered in the Sheriff-Court), the charge thereon operated interruption of prescription, though followed by no further steps till expiry of the six years.²

In the case of action, it is enough that action has been 'commenced.' BY ACTION. And a citation to appear in Court seems to be sufficient, though such citation, if not followed by other proceedings, will itself prescribe, unless renewed in seven years.³ But it is clearly advisable that the action on the bill should be brought into Court, so that all doubt whether it has been 'commenced' may be excluded. The diligence or action, however, with their executions, in order to be effectual, must be formal and regular in themselves. A summons will not interrupt, if the execution is not duly subscribed by the witness or witnesses, in terms of law.⁴ Such an execution proves nothing. The summons, too, must refer specially to the bill or note; it being required that the diligence or action shall be raised or commenced thereon; and, therefore, a citation on a blank precept, issued from the (now abolished) Court of Admiralty in Scotland, was found not to interrupt.⁵ Such a form of proceeding is now incompetent; but the relative principle would no doubt be applied to any case in which the bill or note was not sufficiently identified in the diligence or action. It is not necessary, however, that the creditor himself shall raise a separate action. It is enough if he makes a judicial demand, on which decree can be competently pronounced in his favour. The demand may take place in a process brought for behoof of himself and other creditors in common; for example, a process of ranking and sale of the debtor's estate;⁶ or in a process of multiplepoinding, brought for distribution of the debtor's funds;⁷ or, generally, in any other process of competition.⁸

Prescription is also interrupted by producing the bill, and pleading compensation on it, in a process of suspension of the charge on another bill. The judicial demand of compensation, founded on the bill by way of defence, is held to be sufficient action 'thereon' under the Statute.⁹ But prescription is not interrupted when there is merely a suspension, at the instance of the debtor in the bill, of a threatened charge under letters of horning upon the bill. The suspension is not action on the bill, nor

¹ Henderson, 14th Dec. 1830, 9 Sh. 180.

² Fraser, 11th June 1831, 9 Sh. 723.

³ 1669, c. 10; Thomson, p. 631.

⁴ Baillie, 2d March 1790, M. 11,286.

⁵ Gordon, 23d June 1784, M. 11,127.

⁶ Douglas, Heron, & Co., 26th Nov.

1784, M. 11,127; Lindsay, 17th February

1854, 16 D. 600.

⁷ National Bank, 5th Dec. 1837, 16 Sh. 177.

⁸ Bell's Comm. i. 393.

⁹ Ross, 20th July 1855, 17 D. 1144.

is the threatened charge diligence.¹ Interruption, however, results by Statute from presenting, or concurring in, a petition for sequestration of the estates of any one of the parties to the bill, under the Bankrupt Act,² or from lodging a claim in the hands of the trustee, or the Sheriff, or preses at any meeting of creditors in such sequestration. The interruption, in that case, also bars the effect of any statute of limitations in any part of Her Majesty's dominions; and is effectual though the sequestration shall be recalled (sect. 109). A question seems to have occurred, whether the commencement of legal proceedings on a bill in England interrupted prescription in Scotland; and the decision seems to have been that it did not, but the grounds of judgment are not stated.³

SEVERAL
OBLIGANTS.

When there are two or more obligants on the bill or note, a charge given, or decree competently obtained, within the years of prescription, against one of them, interrupts prescription as to all of them. The obligation undertaken is joint and several; and diligence has been 'raised and executed,' or action has been 'commenced,' on the bill, as required by the Statute, which does not distinguish between diligence or action, against one or all of the parties liable;⁴ and, prescription being interrupted by diligence done by the holder, the benefit of the interruption accrues to an obligant who pays the bill, and has it transferred by a blank indorsation.⁵ But the decree, in order to be effectual to interrupt prescription, must be in favour of the creditor in the bill or note. Thus, though the debtor, within the years of prescription, obtains decree in an action of relief against a party bound to relieve him, the decree does not enable the creditor in the bill to plead interruption of prescription, although the bill and oath of verity by the creditor are produced in the debtor's action of relief.⁶ The action of relief is *res inter alios acta*, and the decree in it being merely for relief, and obtained before expiry of the six years, affords no evidence of the subsistence of the bill after the expiry of that period. The application for a warrant against the debtor in a bill, as *in meditatione fugæ*, does not operate interruption.⁷ Such an application merely shows the creditor's intention to raise diligence, or commence action. It is not itself either; and, if nothing follows on it, the intention will be held as departed from.

EFFECT OF
PRESCRIPTION.

We have now to consider the effect of the prescription when it takes place; and here it is necessary to distinguish between the bill or note and the debt which was thereby represented. The bill or note ceases to be 'of force, or effectual to produce any diligence or action.' But action may be brought, at any time within forty years from the time when the bill was exigible, for the debt; and if the debt can be established, independently of the bill or note, decree will be given. But decree in absence, in an action for the sum in a bill, which was

¹ Scott, 12th December 1828, 7 Sh. 192.

² 19 & 20 Vict. c. 79.

³ Hunter, 9th June 1831, 9 Sh. 703.

⁴ Soutars, 29th June 1827, 5 Sh. 876;

Gordon, 23d June 1784, M. 11,127; Roy, 14th June 1850, 12 D. 1028.

⁵ M'Lachlan, 16th June 1831, 9 Sh. 753.

⁶ Arbuthnot, 3d March 1795, M. 11,133.

⁷ Boag, 17th Jan. 1849, 11 D. 362.

only commenced after expiry of the six years, will afford no ground for diligence, either against the debtor's person or estate.¹ An adjudication, brought on the bill after lapse of the six years, and without any previous decree constituting the debt, was reduced as inept.² The Lord Justice-Clerk Boyle said, 'An adjudication on a prescribed bill is good for nothing.'

In the cases we have been considering, the debt was constituted by the bill or note only. But it may stand on a separate obligation or voucher independently of the bill; and such obligation or voucher will remain, notwithstanding the prescription of the bill, unless the bill was taken as a substitute for it, and was intended to extinguish it by *novatio*. Thus a docketed account was held a separate subsisting obligation or voucher, notwithstanding that a bill had been granted for the balance due, and had expired.³ And a debt, arising under the clause of warrandice in a conveyance of lands, and relative decree-arbitral, was held to subsist, though a bill for the amount had been granted, and had expired.⁴ In similar cases, it would obviously be expedient to preserve evidence (apart from the bill) that the bill is only an additional voucher of the debt, and, in fact, chiefly intended to fix the term of payment of the amount. In another case, where the holder of an unprescribed bill subscribed the deed of accession by creditors to a trust-deed by the common debtor for their behoof, and both in the trust-deed by the debtor and deed of accession by the creditors the debt was narrated, and it was recognised by letters and various acts of the trustees, as well as in a re-conveyance to the truster's (that is, the debtor's) heir after his death, it was decided that the intervening prescription of the bill could not be pleaded against the debt. The trust-deed by the debtor, and what followed afterwards, operated a separate constitution of the debt, independently of the bill.⁵ This case deserves careful study, as suggesting the extreme caution necessary to preclude the plea of prescription against a bill or note, and likewise pointing out the form of action for debt after the years of prescription are run. There is a valuable note by Lord Moncreiff, Ordinary, subjoined to his interlocutor.

These are cases of separate constitutions of the debt; either before granting, or during the currency of, the bill; and which are not open to the statutory plea of prescription. And the Statute, sect. 39, provides two other modes of proof of the debt after expiry of the six years, viz., that at any time after expiration of the six years it shall be lawful and competent 'to prove the debts contained in the bills and promissory-notes, and that the same' (that is, the debts) 'are resting-owing, by the oaths or writs of the debtors.'

The lapse of the six years creates the presumption that the debt has been paid; and, to overcome such presumption, the writ or oath must

¹ M'Nicol, 29th November 1821, 1 Sh. 175.

² Scott, 12th Dec. 1828, 7 Sh. 192.

VOL. I.

³ Campbell, 19th May 1797, M. 1648.

⁴ Sinclair, 19th Dec. 1823, 2 Sh. 600.

⁵ Ettles, 15th Feb. 1833, 11 Sh. 397.

prove the subsistence, and not merely the constitution, of the debt. It is not enough to prove that there was a debt; it must be proved that the debt is 'resting-owing.' A failure on this last point would be fatal to the claim, though the constitution should be established.

DEBTOR'S WRIT. In proceeding by writ, the most satisfactory evidence is a probative acknowledgment of resting-owing from the debtor, granted after expiry of the six years. But a letter, or other writing, importing that the debt was due, has been held sufficient; for example, a letter from the debtor to the creditor, after the six years, requesting him 'to send a copy of the bill, and the payments made on the back of it, so that he might settle the balance,' was held to support an action for payment of this balance.¹ And a letter, granted after the six years, agreeing to pay a composition on the debt, was held to establish resting-owing;² also a letter acknowledging the debt in the bill by implication.³ The same effect has been given to markings, made in the debtor's handwriting, of interest paid on the bill after expiry of the six years.⁴ These markings amount to an acknowledgment, by the debtor's writ, that the principal sum was resting-owing after that period; and a letter, acknowledging payment of interest, after lapse of the six years, found in the debtor's repositories, was held (though written by the creditor, and not by the debtor) to be writ of the debtor effectual to elide prescription. It was a writing belonging to the debtor, and proving that interest had been paid after the expiry of the six years.⁵

Similar markings of partial payments to account of the principal sums, made by the debtor's representative, after the six years, and marked by him on the back of the bill, have the same effect, as they imply an acknowledgment by the debtor that the balance of the debt is resting-owing;⁶ and entries made in the debtor's books, by his clerk, have been held the same as if made by himself; these books, whether kept by the debtor or by a clerk, being held to be the debtor's writ.⁷ But markings of interest by the debtor's ordinary factor or agent will not be enough, even if the payments to which they refer have been regularly entered in accounts. The factor or agent is not the same as the party; and to acknowledge that a debt is resting-owing by his principal, requires more than the usual mandate held by a factor or agent.⁸ But when the agent for the representative of a deceased debtor was acting for the representative under a mandate from her, with express power to act for her, and on her behalf, in all matters connected with the affairs of the deceased, such agent was held to be in the place of the representative, *quoad hoc*, and his writ was held equivalent to that of the representative, and to support a claim to the debt.⁹

Payments or markings within the six years, by whomsoever made, will

¹ Russel, 23d May 1792, M. 11,130.

² Mackenzie, 15th Feb. 1827, 5 Sh. 367.

³ Elder, 3d Dec. 1830, 9 Sh. 133.

⁴ Fergusson, 7th March 1811, F. C.

⁵ Wood, 7th Feb. 1843, 5 D. 507.

⁶ Scott, 3d Feb. 1784, M. 11,126.

⁷ Black, 16th Jan. 1823, 2 Sh. 118.

⁸ Fergusson's case.

⁹ M'Gregor, 27th June 1860, 22 D. 1264.

be of no avail to support the debt. They must, for that purpose, be after expiry of that term.¹ The only exception to the rule, that the markings or acknowledgment must be made after expiry of the six years, occurs in a case in which the acknowledgment of the debt was granted one day before expiry of the six years; but there was evidence that the acknowledgment was intended to establish the debt.² An acknowledgment of the debt, however, by the representative, within the years of prescription, followed by a payment of interest arising within these years, made after expiry thereof by the representative's orders, will exclude the plea of prescription on the part of such representative.³ In Lindsays' and other cases, an opinion was thrown out that an acknowledgment within the six years introduced a new term from which prescription was to commence running; and the same view was suggested in the case of Arbutnot, already quoted. But if the bill is kept up by the interruption of prescription, or if the debt is saved by acknowledgment, the bill or debt, as the case may be, may subsist for forty years. A mere acknowledgment, however, within the six years (if not amounting to an obligation independent of the bill) will not save the bill, nor introduce the long course of prescription. During the six years the bill itself contains everything that can possibly be embraced in an acknowledgment.

In the case of two or more obligants, we have seen that diligence, raised and executed, or action commenced, within the six years, against one, interrupts prescription as to all. But neither an acknowledgment of the debt, nor the marking of interest by only one of several obligants, made after elapse of the six years, nor a decree against one of them obtained in an action raised after said elapse, nor the drawing of a dividend from the estate of one of them, will save the debt as against the other or others.⁴ The reason of this is explained by the Court in M'Indoe's case, thus: 'There is a marked distinction between the document and the debt. If an action be raised against one co-obligant before the lapse of six years, the bill will be sustained against all the rest for forty years; but if not till after the six years have expired, the only question will then be whether the debt be proved. By the lapse of six years, all the privileges and effects of the bill are lost; and it is the debt, and not the bill, which must be proved by the writ or oath of the debtor; but the writ or oath of each debtor can only affect himself. It is quite inaccurate to say that the prescription is interrupted by a marking of payment of interest after six years, for this is merely the writ of the party establishing the debt. It has been thought by some that the writ or oath of the debtor rears up the bill for a second course of six years, but this is quite incorrect. It is the debt only which is raised up, and it is then subject to the ordinary prescription.'

¹ Cases of Russel and Fergusson, both above cited; Horsburgh, 13th Feb. 1811, F. C.

² Lindsays, 19th May 1797, M. 11,137.

³ M'Tavish, 25th January 1825, 3 Sh. 472.

⁴ M'Neil, 31st Jan. 1823, 2 Sh. 174; M'Indoe, 18th Nov. 1824, 3 Sh. 295.

DEBTOR'S OATH.

We are now to consider the mode of proof of the debt by the oath of the debtor or obligant, as allowed by the Act introducing the sexennial prescription of bills and notes.¹ And you will recollect that it is not enough to prove the original constitution of the debt. It is necessary to prove that it is still resting-owing. After the lapse of the six years, neither the bill, nor any acknowledgment granted within the six years, is proof of either of these facts; although they may be referred to as adminicles of evidence.² When the six years are expired, the oath or writ must prove both.³ But here there are certain distinct classes of cases to be kept in view: (1.) those of the proper debtors themselves; (2.) obligants by way of accommodation only; and (3.) the representatives of deceased debtors or obligants.

As regards the constitution, where an obligant on his oath deponed that, though he accepted the bills, he did so by mistake, imagining them to be receipts for money advanced to him on account of a son of the drawer, it was found that the constitution of the debt was not established.⁴ This deposition was held to imply that there never had been a debt. The same was held, where the deposition bore, that though the party (the cautioner for an apprentice fee) had signed the promissory-note, the holder had stated to him at the time that it would never form a debt against him; 'that he would, in no circumstances, and at no future time, be called upon for payment of a farthing of it.'⁵ The claim in this case was brought only after the grantee's death by his representatives; and the oath was held as negative of the constitution of the debt as against the party making oath as above. But, where the constitution of the debt is admitted, it is not enough for the proper debtor to depone that he does not admit that it has not been paid. It is his debt; and, if he has paid it, he ought to be able to say so distinctly. It is not even enough for such party to depone generally that the debt has been paid; if, with respect to the circumstances of the payment, he does not satisfy the Court that he has adequate grounds for his averment.⁶ And the oath, even if it avers payment in a mode particularly specified, of which, in ordinary circumstances, there would be separate proof, will not of itself be accepted as enough to prove payment.⁷ The Lord Justice-Clerk Hope said, in Stewart's case, 'I think the solution of the case is in Erskine's doctrine, that what properly lies upon the defender (the obligant) to prove, is not to be held as embraced in the reference; but 'must be substantiated in some other way.'

PARTNER'S OATH.

The case of a party who was partner of a company by whom a bill or note was granted, is much the same as that of an individual debtor. The company-debt is the debt of each of the partners, and each is bound to know and state positively whether it has been paid or not. And

¹ 12 Geo. III. c. 72, s. 39.

² Christie, 19th June 1833, 11 Sh. 744; Menzies, p. 381.

³ Thomson, p. 652.

⁴ Agnew, 20th Feb. 1784, M. 13,219.

⁵ Baird, 21st June 1827, 5 Sh. 820.

⁶ Paul, 10th March 1841, 3 D. 874.

⁷ Stewart, 13th Nov. 1852, 15 D. 12.

when a partner admitted the constitution of the debt; and stated that he had never paid it; that he did not know of any of his partners having paid it; that none of them had made any claim upon him on account of it; and that, though one of them had undertaken to collect funds, and pay a composition on the debts, he did not know that this had been done,—the Court held that there was a presumption of resting-owing, and decerned for payment, reserving to the party to prove settlement by composition.¹

The case of the obligants under accommodation-bills is peculiar; and here I will quote the clear and concise statement of Professor Menzies on the subject:² ‘When the Statute of 1772 came to be applied, considerable difficulty and great difference of opinion were found to exist, with respect to such debts as had been constituted solely by the bill or note,—when, for instance, the acceptor had signed for the accommodation of another. Here it was contended the debt exists only by virtue of the bill; and as, by the Statute, the bill is annihilated, the debt necessarily ceases to exist also. To this it was answered, that the bill has, no doubt, ceased to exist as a document of debt, but it may be referred to in explanation of the question, “Did you engage to pay the debt contained in this bill?” The undertaking to pay the debt is in itself an obligation irrespectively of the bill; and, if that obligation be proved by the party’s oath, that is proof in terms of the Act, independently of the bill, which is thus used only circumstantially in order to get at the obligation, and not as in itself evidence of it. The latter view has prevailed.’ Accordingly, where the acceptor of a bill, held by an onerous indorsee, admitted that he had signed the bill, and was unable to say that it was paid, but merely that he signed it without value, for the drawer’s accommodation,—the Court held the bill unpaid, and, as the acceptor’s plea of having received no value was no defence against an onerous indorsee, decerned against the acceptor for payment of the debt.³ The statement in this case was made in pleadings before the Court, not on oath. In two later cases, where parties admitted having signed accommodation-bills, that the amount had been advanced on the faith of their obligation, and that they had not paid the debt, the Court decided against them.⁴ The principle thus established,—of the liability of the acceptor of an accommodation-bill, when he admits that the amount was advanced on the faith of his obligation, and cannot prove payment,—has been since recognised in several other cases.⁵ But when the debtor or obligant is dead, and his representative, upon a reference to oath, depones that he is ignorant in regard to the constitution and subsistence of the debt, prescription will operate; because such a deposition affords no proof in terms of the Statute.⁶

ACCEPTOR OF
ACCOMMODATION-BILL.

¹ Beattie, 25th Jan. 1827, 5 Sh. 236.

² Menzies, p. 381.

³ Philip, 15th Jan. 1800, M. App. Bill, 9.

⁴ M’Neil and Others, 21st Jan. 1825, 3 Sh. 459; Laidlaw, 31st May 1826, 4 Sh. 636.

⁵ See particularly Wilson, 3d March 1830, 8 Sh. 625; Christie, 19th June 1833, 11 Sh. 744.

⁶ Stirling, 11th March, 1817, F. C.; Houstoun, 19th May 1825, 4 Sh. 24.

EXCEPTION OF
MINORITY.

With regard to the plea of minority, it will be observed that, by 12 Geo. III. cap. 72, sect. 40, it is enacted, 'That the years of the minority of the creditors,' in bills or notes, 'shall not be computed in the said six years.' This exception is pleadable by the holder, and if a bill, before it would expire by prescription, in the hands of the then holder, is *bond fide* indorsed to a minor, or devolves upon a minor by succession, prescription will be suspended during the indorsee's minority.¹ But when the bill, though beneficially a minor's property, is held for him by a trustee who is major, the minority of the beneficiary cannot be pleaded.²

When one who is cautioner, or not the proper debtor, pays a bill or note, his claim of debt against the proper debtor appears not to be cut off by the sexennial prescription. The claim rests not on the bill, but on the fact of his having made an advance for the debtor.³ The law of prescription applicable to bills appears in each case to depend on the law of the place where the bill is made payable, not where it is drawn.⁴

In a case where the holder pleaded interruption on the ground of the debtor's outlawry, under sentence pronounced during the currency of the six years, it was answered, *inter alia*, that the Act was imperative, and allowed no exception but in the case of minority. The answer was successful.⁵

It is hardly necessary to observe, that, although the debt may be kept up after lapse of the six years by the writ or oath of the party, there is no ground thereby established for summary diligence, which is competent exclusively on the bill or note. For the debt, action only is competent.⁶

CHAPTER VIII.

PURPOSES
FOR WHICH
BILLS MAY BE
GRANTED.

BILLS and notes, though originally connected with mercantile transactions only, and looked upon with great jealousy as connected with further purposes, so long as they were valid documents during forty years, may now be granted not merely for debts of an ordinary character, but also for services of a nature which, in many cases, would not constitute a legal claim of debt. Thus, a bill for £8, granted by a person *moribundus* to a neighbour, as an acknowledgment for services, consisting of attendance during the acceptor's illness, and payable at a term which happened in the acceptor's lifetime, was found actionable after his death.⁷ But a bill is not effectual to con-

¹ Thomson, p. 659; Patrick, 8th March 1859, 21 D. 637.

² M'Neil and Others, 31st Jan. 1823, 2 Sh. 174.

³ Ralston, 23d May 1792, M. 1533. 11,130; Jolly, 28th May 1829, 7 Sh. 666.

⁴ Thomson, p. 660, and cases there cited.

⁵ Brodie, 20th Feb. 1821, F. C.

⁶ Armstrong, 16th May 1804, M. 11,140.

⁷ Low, 21st May 1805, Hume, 52. See also on this point Steel's Disponees, 18th Dec. 1793, M. 1409.

stitute a proper legacy.¹ Neither can a bill be made the means of destining a sum of money to a substitute. The substitution of one party for another introduces a condition in the constitution of the obligation as to the payee, which annuls the bill, even in the hands of the institute.² And it may be doubted whether the acceptance of a bill, or making of a promissory-note, is to be relied on as a habile mode of creating a debt against the acceptor or granter, so as to constitute a donation *inter vivos*.³ But cases of donations by granting bills are to be contrasted with those in which donations by the indorsation of bills, or otherwise than the direct granting of these documents, or the acceptance of bills, were sustained.⁴ In Barbour's case, a donation from a husband to his wife, made by his indorsing and delivering two bills to her, was sustained. And the decision appears perfectly consistent with the strictest rules regarding bills; for there can be no doubt that the husband might have made a donation to his wife, in the circumstances, by assigning to her a bond. In the case which happened, he assigned to her a bill, by the appropriate form of indorsation. He did not thereby constitute a debt against his own estate in her favour, by means of a bill; he perhaps could not have done so; he merely transferred to her a debt due to him by a third party. A gift, made by means of indorsing or transferring a bill, was again sustained in a later case;⁵ and on the same principle, the draft by a party *moribundus* upon his debtor, in favour of a brother-in-law, was sustained, though purely and expressly a gift.⁶ This likewise was a case of transfer, and not the constitution of a debt. We have another decision, in which a donation, *mortis causa*, was found to be effectually accomplished by means of bills.⁷ A party accepted bills drawn upon him by his brothers-in-law, who granted corresponding acceptances in favour of his wife and children. The Court sustained action by the brothers-in-law against the representatives of the deceased acceptor; appearing to adopt the argument of the brothers-in-law, that, to them, these bills did not constitute any donation, having been given for a specific value, viz., the equivalent bills accepted by them in favour of the party's wife and children.

Bills or notes have likewise been sustained as means of constituting debts where they were not pure donations, or where that point was not clear.⁸ In Provan's case, the bill appears to have been regarded as, in part, the recompense for a breach of promise of marriage, and as representing at least a moral obligation in favour of the grantee. As a pure donation, there seems to be as yet no authority for supporting such a document.

DONATIONS BY
INDORSATION.

¹ Huttons, 13th Feb. 1724, M. 1412; Wrights, 11th Feb. 1761, M. 8088.

² Inglis, 27th July 1739, M. 1404.

³ Weir, 26th Nov. 1736, and 7th Jan. 1737, M. 1413; Gibson, 3d Aug. 1776, 5 Br. Sup. 392.

⁴ Barbour, 8th Feb. 1753, M. 6097.

⁵ Carrick, 6th Feb. 1787, M. 17,009.

⁶ Reid, 29th Nov. 1808, Hume, 60.

⁷ Adam, 2d Dec. 1782, M. 1416.

⁸ Provan, 23d Jan. 1742, M. 9511, Elchies, *voce* Bill, No. 25; affirmed 12th Jan. 1744, 1 Craigie & Stewart's App. 359.

**DRAFTS ON
BANKERS.**

Before leaving the subject of bills, it may be well to make a few observations in reference to drafts, or cheques on bankers. These, though payable to the bearer on demand, and issued within fifteen miles of the place where they are made payable, are no longer exempted from the penny stamp-duty.¹ They are authenticated in the same way as bills; and, as the law lately stood, money paid by the drawee on a forged draft, appended to a letter of credit on the drawee (a branch bank) from the head office, was held no payment at all, as between the party paying and him whose name was forged.² There does not appear to be a report of the decision on this point, in Orr's case, in the Court of Session. A decision to the same effect was pronounced in another case.³

**FORGED
INDORSATION.**

The drafts in both cases, however, were paid prior to the passing of the Act 16 & 17 Vict. cap. 59; which, by sect. 19, declares, that any drafts or orders on bankers, for sums payable to order, or on demand, and which, when presented for payment, shall purport to be indorsed by the person to whom the same are payable, shall be a sufficient authority to the banker to pay the same. Were the same question hereafter to occur, as to a forged indorsation of a draft or order on a banker, payable to order or on demand, the banker would, under ordinary circumstances, be exonerated, equally as if the indorsation were genuine. The Act, however, you will observe, extends only to the case of drafts on bankers payable to order or on demand.

**PAYABLE TO
BEARER.**

The drafts, if payable to the bearer, may be transferred by mere delivery. They may also be transferred by indorsation.⁴ In M'Gilchrist's case the draft was expressly to the bearer, or his order; which the Court held to exclude all question on the part of the drawer, as to its being negotiable. But the authorities hold drafts, though not to order, to be transferable by indorsement. It is also settled that an indorser is liable to the indorsee or holder for payment of the sum in the draft.⁵

The banker, if he has funds in hand, or on which the drawer is entitled to operate, is bound to pay on demand. There is no case here for acceptance. But the presentment must take place within the usual business hours. The question does not appear to have occurred in Scotland, within what time a party, receiving a draft from another party on his banker, must present it in order to exempt himself from responsibility in case of the bank or drawer failing, and of payment being therefore refused. In M'Gilchrist's case the presentment was not made for nine days, by which time the drawer had withdrawn his funds from the bank, and the draft was dishonoured. But the bank was solvent, and the drawer had no right to complain of the delay, because third parties were not concerned; having granted the draft, he ought to

¹ 21 & 22 Vict. cap. 20.

² Orr & Barber, 31st Jan. 1852, 14 D. 395; as decided 17th Aug. 1854, 1 Macq. App. 513.

³ Caledonian Insurance Company, 8th July 1859, 21 D. 1197.

⁴ M'Gilchrist, 16th Jan. 1794, M. 877.

⁵ Macdonald, 29th March 1864, 2 Macph. 963.

have left funds to meet it in the hands of his banker. The rule in England is, that the presentment be not later than the day following that on which the draft is received, provided the party has the means of so presenting.

I formerly noticed the risk of bills or notes, payable to the bearer, being lost or stolen; and the same risk arises in the case of bank drafts. The risk can be obviated, in the case of bills and notes, by special indorsation; and we have now statutory provisions which greatly remove the risk as regards bank drafts. A custom has obtained, in the case of such drafts, of writing across them the name of a banking-house, or the words, 'and Co.,' so placed as to leave room for prefixing thereto the name of any particular banking-house—such as, 'Coutts and Co.' The object was to prevent the draft from being paid except through the banking-house named. It having been found, however, that, as the law stood, the above writing did not prevent the banker, to whom the order was addressed, from paying to the bearer, the Act 19 & 20 Vict. cap. 25, was passed, by which, for the ease of commerce, the security of property, and the prevention of crime, it was declared (sect. 1) that 'in every case 'where a draft on any banker, made payable to bearer, or to order, 'on demand, bears across its face an addition, in written or stamped 'letters, of the name of any banker, or of the words "and Company," in 'full or abbreviated, either of such additions shall have the force of a 'direction to the bankers upon whom such draft is made that the same 'is to be paid only to or through some banker, and the same shall be 'payable only to or through some banker.' The term 'banker,' however, by sect. 2, includes those who act as bankers.

It having been held that the crossing so written might be obliterated without annulling the draft, the Act 21 & 22 Vict. cap. 79, was passed, by which (sect. 1) it was declared that the crossing should be a material part of the draft, and should not be obliterated or added to or altered after the draft was issued; and the banker on whom the draft was drawn is prohibited from paying to any one except the banker with whose name the draft is crossed. The drawer of the bank draft cannot plead against an onerous indorsee compensation in respect of a debt due to him by the payee.¹ It was observed, in *M'Gilchrist's case*, that such a draft was 'equally free from compensation with a bank-note.'

The Juridical Styles contain² the form of the protest of the draft on a banker for non-payment, and the form of letters of horning on the protest registered. But in *M'Gilchrist's case* it was questioned whether horning was competent on such a document, and the charge there was turned into a libel. Mr. Thomson³ expresses doubt whether even protest is competent, and says⁴ that summary diligence is not warranted; that being a statutory remedy, not extended, as he thinks, to bank

¹ *M'Gilchrist's case*, above quoted.

² *Style Book*, ii. 22, & iii. 596.

³ Thomson, p. 191.

⁴ *Ibid.* 557.

drafts. The safe remedy, in case of non-payment, is an ordinary action.¹

Apart from the Act regarding the effect of obliterating or adding to or altering the crossing written upon drafts, which does not extend to bills or promissory-notes, drafts on bankers are on the same footing as bills and promissory-notes, as regards vitiations by erasure or alterations. These, if made in material parts after the draft is issued, or without consent of parties before issue, render the document void.²

We have now completed the consideration of this important class of documents as far as our limits will allow ; and, in concluding, I shall only press upon your attention that, as these writings enjoy remarkable privileges, they have corresponding peculiarities, requiring minute and anxious care and accuracy in framing, negotiating, and enforcing them, the non-observance of which may involve serious professional responsibilities.

¹ See on this subject, Menzies, p. 385.

² Edinburgh & Glasgow Bank, 13th July 1858, 20 D. 1246.

TITLE VIII.

ENFORCEMENT OF OBLIGATIONS.

CHAPTER I

WE have now considered the mode in which ordinary obligations, including those contained in bills and promissory-notes, are constituted, transmitted, and extinguished; and we shall proceed to examine the various modes in which, when necessary, lawful force is applied for compelling the fulfilment of such obligations,—that is, the circumstances and manner in which the law steps in, and the proceedings which may be adopted under sanction of the law, in case the debtor or obligant refuses or is unable to fulfil his obligation, or to comply with the decree of the Court against him. In such cases, both the debtor's person and estate may be attached or affected at the instance of his creditor; but the law does not allow the creditor to proceed either at his own hand, or in his own name. The steps which may competently be taken have a certain degree of violence in them; authorizing, on the one hand, the apprehension and detention of the debtor's person, and, on the other, the forcible withdrawal from him of the control, and finally of the actual property, of his estate, unless he shall fulfil his obligation; and although these steps are purely of a civil character, and proceed on the petition or at the instance of the private party, that is, the creditor, they run either in the name of the Sovereign, or of a Court having jurisdiction, and are executed and enforced by public officers only. The steps here referred to are, in England, termed writs of execution; in Scotland, they are called diligence; a term, the origin of which, as applicable to such writs, does not appear to be very clearly known. Lord Stair's explanation,—that they are called diligence, because they excuse the users thereof from negligence,—is thought to be no other than an ingenious conjecture by Mr. Ross,¹ who says the word is purely French, and is the ordinary practical term, synonymous with the word 'pursuit,'—sometimes meaning the process itself, and at other times the execution. Lord Stair draws a

¹ Ross, i. 234.

distinction between diligence and executorials, which, Mr. Ross says, is from the French practice, and coincides exactly with our own. When letters are issued by the King, or the Supreme Courts, for compelling obedience in civil business, they were, and still are, termed '*Lettres Exécutoires* : ' when executed they become diligences. Our letters and precepts, before execution, were also termed executorials ; hence the language of our (more ancient) clauses of registration,—' that letters of horning, or other executorials necessary, may pass hereon.' It is only after execution, that, properly speaking, they become diligences, ' in ' which term are included the executions or indorsations themselves. ' In general, however, the King's letters are termed diligences even ' before execution.' Lord Stair here, you will observe, uses the term ' indorsations ' as synonymous with ' executions,' that is, because the executions were, in practice, indorsed on their warrants.

From the undoubted influence of French customs upon judicial forms and practice, during a pretty long period in this country, it is natural to suppose that our word ' diligence ' is immediately derived from France ; but, probably, the origin of the word used both there and here is the Latin word '*diligentia*,' in the sense of earnestness or eagerness. The proceedings by which alone force could be employed, in order to bring about the payment of a debt, or fulfilment of a decree, and by the employment of which a creditor would evince his determination to recover his debt, and a debtor would be made immediately to employ his utmost efforts to satisfy the claim, might well be regarded as the only evidence of earnestness. Viewed as a practical matter, the definition given by Professor Menzies¹ appears to be very satisfactory, viz., ' Diligence is the legal procedure, by which a creditor strives to obtain performance of his debtor's obligation.'

REAL AND
PERSONAL
DILIGENCE.

Diligence is divided into real—that is, against the debtor's real or heritable estate, or which requires a real right in such estate as its warrant ; and personal—that is, against his person, and personal or moveable estate ; though, in a certain sense, diligence against the personal estate ought to be considered as real diligence. The proceedings applicable to diligence against the heritable estate will be considered in connexion with heritable or real rights. We shall, at present, confine our attention to diligence against the person and personal estate ; not including poinding the ground, which, though affecting only moveable or personal effects, is available exclusively to creditors holding heritable or real securities over the ground.

A great change, in regard to the forms of procedure applicable to ordinary cases of personal diligence, was introduced by the Personal Diligence Act of 1838.² But, substantially, the mode of proceeding thereby authorized is of the same import as that which was superseded. And the consideration of the older forms will greatly facilitate the understanding of the forms introduced by the Act, and now in general use.

¹ Menzies, p. 285.

² 1 & 2 Vict. c. 114.

These older forms, it may be also observed, are not abolished. They may competently be adopted; and I think it of importance to examine them, and, before doing so, to touch very briefly on the history of the power of imprisonment for debt in Scotland. That power appears to have been admitted only with difficulty, and by slow degrees. We find it allowed in royal burghs, under the Act of Warding,—a form of procedure supposed to have been introduced by a Statute of Robert Bruce;¹ and which, in such burghs, is still in use. The imprisonment, in such cases, proceeds on a decree of the magistrates. But not only was the Act of Warding confined in its operation to royal burghs, but the diligence against the person even there was not authorized as a first step of execution. The form bears (what was at one time, no doubt, a reality, though now a mere fiction)² that the officer has reported on oath, that he has sought for moveables in order to poind them,—that is, to set them apart with a view to their being sold, and the creditor paid out of the price,—but has found none; and thereupon authority is issued to him by the magistrates to put the debtor's person in ward, there to remain until he shall make payment of the debt.

HISTORY OF
IMPRISONMENT
FOR DEBT IN
SCOTLAND.
IN ROYAL
BURGHES.

Passing beyond royal burghs, the first case in which we meet with authority to imprison is that of the non-fulfilment of an obligation *ad factum præstandum*. And here the warrant to imprison was issued as a first step of diligence, and without discussion of the obligant's moveables being previously required. In the case of ordinary debts, however, the spirit of the law appears to have been very averse to acknowledge the right of imprisonment. This may in some measure be accounted for by the fact, that the feudal law was practically the law of the land. Imprisonment, when it took place, deprived the superior of the services of a vassal or dependant; and superiors, as we know, were very jealous of any interference with their rights and privileges. But the power of imprisonment, already known in burghs under the Act of Warding, and beyond burghs in reference to obligations *ad facta præstanda*, came to be a *desideratum* as to all obligations; and the Church Courts—very powerful at the period now referred to—were made available as the means of obtaining that power in reference to ordinary debts. The Church having had the right to imprison those who disobeyed her injunctions, it became usual, before the time of the Reformation, to take obligations for payment of debt under sanction of an oath by the debtor, and containing consent to his excommunication on failure to pay. By this means the matter was subjected to the cognizance of the Church Courts; and if the debtor failed to pay,—if he did not fulfil what he had sworn to do,—he was excommunicated, letters of poinding of his moveables were executed, and also letters of cursing against himself personally. Under the latter, he was charged to pay the debt, that is, to perform his oath within forty days; and in case of failure, or of disobedience, as it was called, he was denounced rebel to the King and

CHURCH
COURTS.

¹ 2 Rob. I. c. 19.

² Marshall, 8th March 1803, M. App. Burgh Royal, No. 14.

Church ; and letters of caption were issued for his imprisonment and detention until he should pay the debt.

COMMISSARY
COURTS.

LETTERS OF
FOUR FORMS.

The power of the Church was abolished at the Reformation ; but, the Commissary Courts having been shortly afterwards instituted, it was ordered, in the instructions issued by the Queen to the Commissaries of Edinburgh in 1563,¹ that, on production to the Court of Session of decrees of registration from the Commissaries, the Court of Session should issue letters in the four forms (letters of four forms), being the letters on which imprisonment, in respect of obligations *ad facta præstanda*, was then in use to be authorized ; or letters of poinding for fulfilling the decrees, 'as wer wont to be gevin upon persounis quhilkis of befor lay xl. dayis under cursing.' A copy of the letters of four forms will be found in the Appendix to Lord Kames' Historical Law Tracts. They directed four successive charges to be given to the debtor, at intervals of three days each. These letters, which, as we shall see, were the foundation of the diligence, authorizing detention and imprisonment, could thus be issued in civil cases in two modes ; viz.,—(1.) directly under obligations *ad facta præstanda* ; and (2.) on the decrees of registration of the Commissaries of Edinburgh ; and in the latter case, whether the registered obligation was for performance of a fact, or for payment of a debt.

1584, c. 139.

The form of proceeding, under decrees of registration of the Commissaries, was soon afterwards made competent under those of other Courts ; the Statute 1584, cap. 139, having enacted that letters of horning (being the first step in order to imprisonment), as well as letters of poinding, the one without prejudice of the other, should follow on decrees of the Supreme Court, as well as on decrees of other Judges to which the authority of the Lords of Session should be interponed, whether the same were for liquid sums, or *ad facta præstanda*.

The first step, in getting rid of the necessity of the four successive charges required by the letters of four forms, is thought to have been taken when, in clauses of registration, consents were inserted that letters of horning should be directed on a single charge. The consequent decrees of registration were held to warrant such letters accordingly in these cases. But the complicated procedure, under letters of four forms, still remained applicable to the ordinary decrees of the Court of Session, as to which there was no consent to execution on a single charge ; and the manner in which the authority of that Court was interponed to the decrees pronounced by inferior judges was very circuitous,—the creditor being under the necessity of raising an action in the Supreme Court, in which he produced the Inferior Court decree, and obtained another decree in similar terms, called a 'decree conform,' on which last the letters of four forms were raised.

These proceedings were very cumbrous and inconvenient ; and, in the end of the sixteenth and beginning of the seventeenth centuries, a series of Statutes was passed, by which the Court of Session was

¹ Balfour's Practicks, p. 658.

authorized to issue letters of horning on a single charge of fifteen days, on the decrees of the different inferior Courts. Instead of the proceeding by means of a 'decree conform,' the authority of the Court of Session was directed to be interponed in these cases summarily, on production of the Inferior Court decree; and came to be granted by a deliverance or interlocutor on a petition, or, as it is usually called, a bill, addressed to the Court by the creditor. The same summary form of procedure, allowed by these Statutes as to ordinary decrees by inferior Courts, was also adopted, without statutory authority, under the decrees of registration of such Courts. The old method of proceeding by letters of four forms having, however, been still allowed to remain, in the case of the ordinary decrees of the Supreme Court, the Court itself at last abolished them by the Act of Sederunt, 23d November 1613,¹ by which letters of horning were appointed to pass on all the Court's own decrees, as they had been previously allowed by the Legislature on those of inferior Judges.

The general use of the letters of horning came also to supersede the letters of four forms, even when the obligation was simply *ad factum præstandum*. The letters of four forms whilst in use, and thereafter the letters of horning, were the first steps in the procedure having in view the imprisonment of a debtor at the instance of his creditor.

By the 3d and 4th articles of the letters of four forms, the debtor had the alternative given him of entering himself a prisoner in one of the Sovereign's jails. On his non-compliance with these charges, the letters enjoined him to be denounced rebel, and declared his moveables to be confiscated to the public use, and letters of caption were then issued for his apprehension and imprisonment. And here a remarkable peculiarity in the forms of procedure requires to be noticed, as tending to instruct both that the spirit of the law was hostile to the right of imprisonment for civil debt, and that strong ground was at first thought necessary on which to proceed to extremities with the debtor. If the debtor acted on the alternative pointed out in the 3d and 4th articles of the letters of four forms,—by putting himself in ward,—there was no need of any further writ against him. But, in case of his failing to do so, the letters appear to have contained no authority to apprehend him. The simple course would have been, as in the act of warding, to grant authority to imprison him, and detain him till he should make payment; as that was truly the object aimed at. But, except within a royal burgh, the non-payment of an ordinary debt was not then considered a sufficient ostensible ground on which to imprison a debtor; and, the order to make payment being under a writ in the Sovereign's name, and sanctioned by the Sovereign's authority, the device and fiction were resorted to of holding that the non-payment amounted to the crime of rebellion against the royal authority. Accordingly, after the expiry of the time allowed to the debtor to pay the debt, if he did not pay, he was said to fail to obey the command of the Sovereign—he was denounced a rebel,

FICTITIOUS
REBELLION.

¹ Preserved in Spottiswoode's Practicks, pp. 149, 150.

and letters of caption were issued against him, authorizing his imprisonment on the ground not of failure to pay the debt, but of the fictitious rebellion.¹

Until the passing of the Personal Diligence Act of 1838, that fiction continued to be the ostensible ground on which the imprisonment of parties for civil debt took place, except in the case of the Act of Warding in royal burghs, and in some others of minor importance by special Statutes. But the real ground was the non-payment of the debt. The imprisonment was for the debt; and, on passing the Personal Diligence Act, new forms of procedure were introduced, which placed that matter on its correct footing, and practically abolished the fiction.

In order to diligence, there must always be the decree and warrant of a competent Court. The decree may be of registration, or in an ordinary action.

Thus far there has been no change made by the Act of 1838. There must still, as formerly, be a decree and warrant. But under the forms superseded by the Act of 1838, when ultimate diligence against the debtor's person was intended, the first step was to raise (as it was termed) letters of horning, at the instance of the creditor, against the debtor.

LETTERS OF HORNING.

Horning is a writ in the name of the Sovereign, addressed to messengers-at-arms generally, as the Sovereign's sheriffs in that part. This writ consists of two parts: In the first, which may be called the narrative, it recites a representation, or complaint, made by the creditor, setting forth the debtor's obligation, with the decree against him, as the warrant of the diligence. If the decree is by the Court of Session, it is itself a sufficient warrant. If by an inferior Court, it is produced in the Bill Chamber, with a petition or bill, addressed to the Lords of Session, praying for letters of horning, upon which, if all is regular, the Clerk of Court in the Bill Chamber writes the warrant in the words, '*Fiat ut Petitur*,' and the bill with this deliverance becomes the warrant of the letters. The recital, in either case, is followed by the second part, called the 'will,' because of the words with which it commences, 'Our will is.' This contains a warrant to any messenger-at-arms, in the Sovereign's name, to charge or command the debtor to pay the debt, or fulfil the obligation, within a specified number of days, varying according to circumstances, under the pain of rebellion and being put to the horn. Then follows an order that, if the debtor fail, the specified days being elapsed, the messenger shall immediately thereafter denounce him the Queen's rebel, put him to the horn, and use the whole other order against him prescribed by law.

WARRANT TO ARREST AND POIND.

It was competent and usual to incorporate with letters of horning warrant to arrest and poind the debtor's moveable goods and effects; except when the obligation sued on was *ad factum præstandum*, in which case there was no warrant either to arrest or poind; and as (except in that case) the warrant was granted as matter of course, and

¹ Thom & Black, 7 Sh. 158.

could do no harm, it was usual to obtain it,—from whence the letters in most frequent use (except as applicable to obligations *ad facta præstanda*) were letters of horning and poinding; but it is the proper horning alone that we have to consider, in connexion with the diligence against the debtor's person. The letters, whether of horning, or of horning and poinding, pass under the royal signet, and require to be subscribed by a Clerk to the Signet—that is, a Writer to the Signet; and, when a decree of the Court of Session is their warrant, they bear the date of the decree. They express both the year of God and of the Sovereign's reign. The date of signeting,—that is, of impressing the royal signet or seal,—whether the same as the date of the decree or not, is written by the acting Keeper of the Signet upon the letters, in figures, as the year of God is usually also written in the letters. When issued upon a decree, they not only narrate the decree, as already mentioned, but bear to be '*Per decretum dominorum concilii*,'—these words being written at the end of the letters, immediately before the subscription of the Writer to the Signet.

When the letters pass in consequence of the decree of an inferior Court, the petition or bill, addressed to the Court of Session, narrates the decree, and contains a petition which is in these words: 'Herefore the complainer beseeches your Lordships for letters of horning and poinding, at his instance, in the premises, in common form.—According to Justice.' There is then added the name of the party acting as agent, who must be a Writer or Clerk to the Signet, in these words: 'A. B.'s bill.' The bill, with the grounds of debt, are examined by the Clerk of Court in the Bill Chamber, who (assuming all to be in due form) writes an interlocutor or deliverance, granting the prayer of the petition, and which is expressed shortly in these words: '*Fiat ut petitur*, Because the Lords have seen the decree,' or as the case may be. The bill, with this interlocutor granting its prayer, then becomes the warrant for affixing the signet. The letters of horning contain a recital exactly corresponding with that in the bill. The will is likewise exactly similar to that in letters proceeding upon a decree; except that—(1.) as the warrant is not the decree, but the interlocutor or deliverance on the bill, the reason for pronouncing that interlocutor, that is, the words, 'Because the Lords have seen the decree,' or as the case may be, will be inserted at the end of the will; (2.) the date of the letters will be the date of the interlocutor or deliverance at the Bill-Chamber; and, instead of the concluding words in the case of a decree, '*Per decretum dominorum concilii*,' there will be inserted, '*Ex deliberatione dominorum concilii*.' The letters of horning, when obtained in virtue of a bill or petition, are in all other respects the same as when following on a decree of the Court of Session; and the operation and effect of the letters are in both cases exactly alike. They may be placed by the creditor in the hands of any messenger-at-arms for execution. The messenger will thereupon give the debtor a charge for payment, and return a certificate that he has

WARRANT FOR
LETTERS.

done so, which is called his execution. I need not here, however, make any remarks in detail on the old procedure in executions, as we are presently to examine that which is now observed, and the two are substantially alike.

Letters of horning were formerly written in rolls in the same way as deeds, decrees of Court, etc.; and the messenger's execution was then usually, though not always, written on the back of the letters. Hence the letters contained an order to the messenger to deliver or return the same duly executed and indorsed by him to the bearer, that is, the creditor; and the execution, on account of the above mode of writing it, was often called simply the indorsation.

DENUNCIATION.

The command of the Sovereign, through the messenger-at-arms, was, that the debtor should pay (or as the case might be) within the time specified, under the pain of rebellion and being put to the horn; and, supposing that command not to be obeyed, the messenger was directed, immediately after expiry of the days of charge, to denounce him rebel, and put him to the horn. For doing so, the horning itself, with the charge or execution, and the fact that the days of charge had expired, formed the messenger's warrant. Having the letters, with the execution, in his hand, he was supposed to proceed with two witnesses to the market cross of Edinburgh, or of the head burgh of the shire of the debtor's domicile, and there, after crying three several 'oyesses,'—a term derived from the old French word '*oyer*,' to hear,—that is, after thrice calling upon the lieges to listen, he read the letters aloud, and, blowing three blasts of a horn, denounced or proclaimed the debtor a rebel to the Sovereign. It was also supposed that he affixed a copy of the letters and execution to the market cross. These things were *supposed* to have taken place; for, although the messenger and witnesses subscribed the execution of denunciation, expressly bearing that the procedure did actually occur, it long ago fell into disuse; the denunciation being, in fact, written as a mere piece of form, and subscribed by the messenger and witnesses in the messenger's own chambers.

The charge to pay or fulfil, following on the letters of horning, remained in force, as a warrant for denunciation, only for a year and day after its date. If the year and day were allowed to expire without denunciation, a new charge was necessary in order to authorize that proceeding, which could only take place on the lapse of the days of the new charge. And the denunciation was of no effect if not recorded, along with the horning and execution thereof, within fifteen days after the date of the denunciation, in the General Register of Hornings at Edinburgh, or the particular register kept for the shire of the debtor's domicile.

The effects of the denunciation were, in various respects, severely penal; but at present we are considering only its consequence as authorizing the imprisonment of the debtor's person. The debtor being denounced rebel, and the horning and executions, including the de-

nunciation, being duly recorded, the creditor can apply to the Court of Session for letters of caption. This is done by a petition or bill addressed to the Lords of Session, and presented at the Bill-Chamber, setting forth that, upon a day specified, the debtor was denounced rebel, and put to the horn, by virtue of the letters of horning, all the material contents of which the bill specifies. It specifies also the registration of the horning with the executions; and these are produced with the bill, which prays for letters of caption at the creditor's instance in common form. On this bill, a deliverance or interlocutor, in the following words, is written and signed by the Bill-Chamber Clerk:—'*Fiat ut petitur*, 'Because the Lords have seen the registered horning.' The bill, with the deliverance, is then the warrant for the letters of caption, which run in the Sovereign's name, and are addressed to messengers-at-arms as sheriffs in that part, in like manner with the horning. They also consist of two parts—the narrative and the will. The former, the narrative, is an exact transcript of the bill, *mutatis mutandis*. The will consists of several parts,—(1.) a charge to the messengers, in the Sovereign's name, to command sheriffs, stewards, provosts, and magistrates, and messengers-at-arms, to apprehend the debtor, put him within their tolbooth, and detain him there until he fulfil the charge of the letters of horning; giving them power, if necessary, to open all lockfast places, and use the Sovereign's keys (that is, force) for that purpose. This the sheriffs, etc., are to do within three days after they are charged to that effect, under the pain of rebellion and putting them to the horn, with certification that if they fail, the three days being elapsed, the Sovereign's other letters shall be directed against them, charging them thereto *simpliciter*. There is then inserted the reason of the '*Fiat*,' 'Because the Lords have seen the registered horning;' and the letters conclude with the date, which is always that of the deliverance upon the bill. Proceeding on a bill, and not on a decree, the caption bears to be '*ex deliberatione dominorum concilii*.' It passes the Signet, and must be signed by a Writer or Clerk to the Signet. The date of signeting is put on by the keeper, and the bill, with the '*fiat*' thereon, are retained at the Signet-Office as the warrant for issuing the letters.

In older practice, letters of second caption were in use to be directed against sheriffs and magistrates, charging them within three days to apprehend the debtor; and, if they disobeyed, denunciation followed, and simple letters of caption were issued, under which the sheriffs and magistrates themselves might be incarcerated; but proceedings of that nature are now entirely obsolete.¹

The caption was, by itself, a sufficient warrant to any messenger-at-arms to apprehend and incarcerate the debtor, and to keepers of prisons to receive and detain him; and, whilst he was detained, the keeper of the prison necessarily retained the caption; but, as late as the year 1828,

¹ The forms of the writs can be referred to, as matters of curiosity, in Dallas' *Styles*, vol. ii. p. 18 & 19, Edit. 1774.

when the last edition of the *Styles of Signet Letters* was issued by the Juridical Society, messengers-at-arms, in some parts of the country, were in use to charge the magistrates to receive the debtor before they incarcerated him.

CHAPTER II.

PERSONAL DILIGENCE ACT.

ALL the forms now explained may still competently be used ; but in most cases it will be found best to resort to those introduced by the *Personal Diligence Act*,¹ which have thrown aside the fiction, so prominent in the older forms, and are in all respects perfectly simple. The above Act came into operation from and after 31st December 1838 ; and, by sect. 1, it is enacted, that when an extract shall be issued of a decree or Act pronounced by the Court of Session, Teind Court, or Justiciary Court, or of a decree (of registration) proceeding upon any deed, decree-arbitral, bond, protest of a bill, promissory-note, or banker's note, or upon any other obligation or document on which execution may competently proceed, recorded in the books of Council and Session, or of the Court of Justiciary, the extractor shall, in terms of the schedule (No. 1) annexed to the Act (or as near to the form thereof as circumstances will permit), insert a warrant to charge the debtor or obligant to pay the debt or perform the obligation, within the days of charge, under the pain of poiding and imprisonment, and to arrest and poid, and for that purpose to open shut and lockfast places. In terms of this section, extracts of decrees, including those of decrees of registration, are made equivalent to extracts of such decrees, followed by letters of horning, or of horning and poiding in the older form ; and, accordingly, by sect. 3 of the Act, it is declared lawful, by virtue of such extract, to charge the debtor or obligant precisely in terms of the decree ; and the messenger executing the same is to return an execution in terms of the schedule (No. 2) thereto annexed, or as near that form as circumstances will permit.

By sect. 7, provision is made for the case of assignees, executors, or others, acquiring right to extracts, with or without execution thereon.

By sect. 8, persons having obtained, or having right to, extracts in the old form, can competently obtain supplementary extracts with warrants to charge in the new form, and proceed thereon agreeably to the provisions of the Act.

And by sect. 9, extracts from the Sheriffs' Courts are placed on the same footing (as regards proceedings within the Sheriff's jurisdiction) as extracts from the Supreme Court within the jurisdiction of that Court.

¹ 1 & 2 Vict. c. 114.

The warrant authorized by the Act is addressed, in the case of decrees of the Court of Session, to messengers-at-arms, authorizing them to charge in Her Majesty's name and authority; in the case of Sheriffs' decrees, to messengers-at-arms and officers of Court, simply authorizing them to charge. In the former case—diligence proceeding on decrees of Supreme Court—authority is given to charge the debtor, 'personally, or at his dwelling-place, if within Scotland, and, if furth thereof, by delivering a copy of charge at the Record Office of the Keeper of the Records of the Court of Session;' in the latter case—diligence proceeding on decrees of Sheriff Court—authority is given simply to charge the debtor 'personally, or at his dwelling-place,' the Sheriff having no jurisdiction beyond his own county. But sect. 13 of the Act makes provision for obtaining, in a simple form, the extension of any Sheriff's warrant by concurrence of the Lords of Session, or by concurrence of another Sheriff, on the application of the party.

Where the extract decree is against an unincorporated company, the warrant to charge will be against the company, and partners thereof generally; and the company, when constituted by a proper firm—for example, 'Brown & Co.'—can be cited by the company name or firm, being the name by which it grants obligations. Citations, in such cases, can be given to the company without citing any of the partners;¹ and the warrant against such a company, and the partners thereof generally, and without stating their individual names, is an authority to charge not only the company, so constituted, as a company, but each of the partners individually.² Indeed, a warrant against a company and one partner, *nominatim*, was held to authorize a charge against another partner, though not named.³ In all such cases it lies with the messenger to discover who are the individuals composing the company. Further, a bond by a company with a descriptive denomination (such as the 'Portsoy Distillery Company') for a cash-credit, binding the company, and the existing and future partners, was found to be a warrant for letters of horning, not only against partners named in the bond, but also against any other individual partners of the company, under which a charge could be given to a partner who had joined the company after the date of the bond, and who had, in terms of the contract of copartnery, become liable for all the company obligations.⁴ From the report of M'Lean's case, it would appear that a charge against a company with only a descriptive denomination is incompetent. This seems to arise, in part at least, from their not granting obligations by signing the descriptive name. In such cases the creditor can proceed against the company only by ordinary action, in which it would appear necessary to call the partners, or some of them, individually. But diligence can be raised against the partners individually,

CHARGE ON
DECREE
AGAINST A
COMPANY.

¹ Forsyth, 18th Nov. 1834, 13 Sh. 42.

³ Knox, 12th November 1847, 10 D.

² Thomson, 2d July 1812, F. C.; Wallace, 19th June 1841, 3 D. 1047; see also Drew, 14th Jan. 1865, 3 Macph. 384.

50.

⁴ M'Lean, 9th December 1836, 15 Sh. 236.

and without charging the company.¹ On this somewhat nice practical point I recommend to your perusal Lord Moncreiff's note in M'Lean's case.

FORM OF
CHARGE.

A Sheriff's warrant is effectual to charge debtors resident within his jurisdiction; and when a protest against a company, and the two individual partners thereof, was registered in the Sheriff-court Books of the shire within which the company (which had been dissolved) had carried on business, and within which one of the partners actually resided, the extract and warrant were held sufficient authority to charge that partner, although the only other partner resided in a different shire, and the protest had not been registered against him.² The warrant, when from the Court of Session, points out the manner in which the charge is to be given to the debtor, thus, 'personally, or at his dwelling-place, if within Scotland, and, if furth thereof, by delivering a copy of charge at the Record Office of the Keeper of the Records of the Court of Session.' Cases in which the charge is given personally require no remark, and it is always desirable that there should be personal execution, when that is practicable. If the debtor cannot be personally apprehended, the officer, or sheriff in that part, that is the messenger-at-arms, will, as directed by the Act 1540, cap. 75, which is held to apply to diligence as well as proper actions, pass to the gate or door of the party's principal dwelling-place, desire entrance, and, if that is granted, exhibit the warrant. If admission is obtained, the messenger delivers his execution to the debtor personally. If it appears he cannot get the party personally, he will execute the charge by offering a copy of the letters or precept to a servant, or some other inmate, to be given to the debtor. This must be at the dwelling-house, and not elsewhere, and the execution must say so.³ If the warrant is not received, the messenger is to affix it upon the principal gate or door of the house. If entrance is not obtained, the officer is first to give six knocks at the door, and then execute in presence of the witnesses at the house, and affix the copy upon the gate or door thereof. If the knocks are not given, the execution will be annulled.⁴

DWELLING-
PLACE.

When the debtor is not charged personally, it is necessary to be strictly accurate in making the charge at his principal dwelling-place. Where the debtor had his dwelling-place in the country, but happened to be in a lodging-house in Edinburgh at the time of the charge, execution in the hands of his servant in the lodging-house (he being within, and asleep, at the time) was found null. It ought to have been at his house in the country, or to himself personally.⁵ And as execution of arrestments at a party's counting-house, which was apart from his dwelling-house, has been found not sufficient, as not in conformity with the Statute of 1540,

¹ See on this subject, Pollock, 28th July 1828, 3 Wil. & Sh. App. 365; Gavin, 17th Feb. 1827, 5 Sh. 375.

² Sutherland, 17th January 1854, 16 D. 339.

³ Nisbet, 30th July 1736, Elchies, Execution, No. 2.

⁴ Darling's Powers and Duties of Messengers-at-Arms, p. 31, and cases cited.

⁵ Bruce, 13th July 1708, M. 3696.

it may be held that execution of a charge on decree and warrant would be equally so.¹

When the debtor is furth of Scotland, he is to be charged at the Office of the Keeper of the Records of the Court of Session;² and by the Act 6 Geo. IV. cap. 120, sect. 53, the mode of citation edictally is extended to persons not having a dwelling-house in Scotland, and forty days absent from their usual place of residence; such persons being appointed to be charged as prescribed by the Act in the case of foreigners. If the charge is on the warrant annexed to an ordinary decree, or decree of registration, in the new form, the warrant contains the power to execute against parties furth of Scotland. But, if letters of horning are used, authority to charge edictally requires a special warrant, obtained by petition or bill, presented to the Court of Session in the Bill-Chamber.³

We have next to consider the subject-matter of the charge,—the payment which the debtor is to be charged to make, or the obligation which he is to perform. This is regulated by the contents of the preceding decree. When letters of horning were in use, and there had been partial payments to account of the sum in the obligation or decree, on which the horning proceeded, these were usually recited in the horning; and a charge given, without crediting sums actually paid to account, was suspended.⁴ The decree, and warrant to charge appended to it, will of course be for the sum due at its date. If part be paid before the charge is given, a probative certificate, or other marking instructing this, should be written on the warrant, and notice thereof should appear in the messenger's copy and execution. The warrant next specifies the party to whom payment or performance is to be made. Where this is an individual, the case is simple, requiring no remark. Where the party is a company, a distinction is to be observed between one with a proper firm or company denomination, and one with merely a descriptive firm. In the former case, that of a proper firm, the charge may be at the instance of, and to pay to, the company, without naming any of the partners.⁵ In the latter case, that of a descriptive firm, there can be no charge at the instance of the company alone. There ought to be conjoined with the name of the company the names of the directors, or of some officer authorized to raise diligence for the company. The charge will be at the instance of the company, and of such directors or officer, and to pay to the directors or officer for behoof of the company. If the charger is a foreigner, it was formerly necessary that he should appoint a mandatory, resident in this country, at whose instance, as well as his own, the diligence should proceed. But this has been altered; at least as to cases where the diligence does not proceed on a bill or

¹ Fraser, 14th January 1795, M. 3706; Sharp, 21st Feb. 1822, 1 Sh. 337.

² Personal Diligence Act, and Act of Sederunt, 24th Dec. 1838, s. 7.

³ Monteith, 18th July 1677, M. 3685.

⁴ M'Martin, 12th February 1824, 3 Sh. 275.

⁵ Forsyth, 18th Nov. 1834, 13 Sh. 42.

petition to the Court.¹ It may still be questioned if a mandatory is not necessary where the diligence proceeds on a bill or petition; the bill imparting to the proceeding something like a process or suit.²

INDUCIA.

We next come to the *inducias*, or days of charge, within which the party is to pay the debt or fulfil the obligation. In the case of bills and promissory-notes, the days are six, when the debtor is resident within Scotland; and in bonds the case is the same, where there is a consent to registration for execution on six days' charge; including in this category the case of all bonds having the consent to registration in the form annexed to the Heritable Securities Act.³ This Act (sect. 2) gives to the short clause contained in bonds and dispositions in security, in the form thereby authorized, the import of a full clause, with consent to registration for execution on six days' charge; and the Titles to Land Act of 1860⁴ extends the power to make use of such short clause to the case of all deeds. When there is no such consent, the days will be fourteen, if letters of horning are used; and fifteen if not, for any debtor resident in Scotland, and not in Orkney or Shetland. The space of fourteen days is fixed as to such charges, on all letters passing the Signet, by the Court of Session Act;⁵ that of fifteen days on other charges, according to immemorial usage, recognised by the Act of Sederunt, 23d November 1613.

**ORKNEY AND
SHETLAND.**

Where the parties are resident in Orkney or Shetland, the days of charge on an ordinary decree of Court, or on a decree of registration, in which there is no consent to registration for execution on a shorter *inducias*, will be forty.⁶ But if the charge is on letters of horning, or other letters passing the Signet, the days in this case are only twenty-one.⁷ And when the party is furth of Scotland, the charge, whether on letters of horning in the old form, or in edictal charges upon decrees and registered protests, will be on twenty-one days; and that not only in the case of bills and promissory-notes, but of bonds with express consent to execution on shorter *inducias*.

Charges on decrees of the Teind-Court are on ten days; upon the warrants in Exchequer Court decrees (which warrants are addressed not to messengers-at-arms, but to the Sheriffs of counties), where the decrees are in favour of the Crown, on six days.⁸ In other cases, charges on Exchequer warrants are on twenty days. No case appears to have occurred of a consent to execution on less than six days' charge; and in the case of Forrester,⁹ Lord Meadowbank says, 'I suspect the Court would startle not a little to find the party consenting to restrict the six days' charge to three, to one, or to none at all.'

**POINDING AND
IMPRISONMENT.**

We next come to the sanction under which the charge is given, or the legal consequences of non-fulfilment, viz.,—'under the pain of

¹ Ross, 8th March 1849, 11 D. 984.

² See Lord Wood's observations in the case of Cooke, 26th Nov. 1850, 13 D. 169.

³ 10 & 11 Vict. c. 50.

⁴ 23 & 24 Vict. c. 143.

⁵ 13 & 14 Vict. c. 36, s. 21.

⁶ 1685, c. 43.

⁷ Court of Session Act, s. 21.

⁸ Court of Exchequer Act of 1856, 19 & 20 Vict. c. 56, s. 28 & 31, schedule G.

⁹ Forrester, 27th June 1815, F. C.

poinding and imprisonment.' These consequences were both incurred under the letters of horning; the imprisonment, by the expression 'under the pain of rebellion and putting him to the horn,' which inferred imprisonment, as in the case of a rebel against the royal authority. The poinding was ordered in terms importing that it could take place as early as arrestment, which was competent immediately after issuing of the letters of horning, and without even a previous charge to the debtor. But there could, in reality, be no poinding till the charge for payment had been given and had expired; and the new form, consistently with the legal rule on this point, does not order the poinding until expiry of the charge.

A variation, which occurs in cases where a debt is payable by instalments, or when the charge is to be given for payment of an annuity, is here introduced in the following words:—'The terms of payment being always first come and bygone.' By the use of these words, the decree and warrant become effectual (as letters of horning likewise may be) for charges, not only in reference to what is due at their date, but for all future payments after the terms of payment thereof are past. The form which was in use in the letters of horning in such case will be found in the *Juridical Styles*.¹

We next have warrants to arrest, and, in case of failure to obey the charge, to poind,—which I will notice in connexion with the diligence against the debtor's moveables. The extract is authenticated by the subscription of the extractor in the Court of Session, and of the Sheriff-clerk, when in the Sheriff-Court; and the proper officer must subscribe. In the case of M'Ghie,² the Sheriff-clerk of one of the wards of Lanarkshire having subscribed a precept granted in another ward of that shire, of which he was not clerk, the precept was held inept.

We now come to the execution of charge, in which the messenger, or officer of Court,—after specifying the date, which must be in words, and not in figures; his own name and office; the nature and date of the warrant; and the parties—says, that he passed and charged the debtor (in Court of Session cases, in Her Majesty's name and authority) to pay the debt, or fulfil the obligation, as the case may be, within the space mentioned in the warrant, and under pain of poinding and imprisonment. He then states in what manner the execution was served on the debtor, viz., personally, or in what other way; naming the place at which it was served, and naming and designing the witness. The messenger or officer subscribes this execution, which the witness also subscribes, adding the word 'witness' to his subscription, in like manner as in the case of an ordinary deed. One witness only is now required in executions of charge.³ The execution will be in one or other of the modes pointed out in the Act 1540, cap. 75, which have been already explained; and it will be recollected that the omission, in the execution, of the solemnities prescribed by the

EXECUTION OF
CHARGE.

¹ *Style Book*, iii. pp. 605 & 619.

³ *Personal Diligence Act*, s. 32.

² M'Ghie, 14th December 1827, 6 Sh. 248.

Act, will be fatal to its validity. The execution must set forth, with exact accuracy, the nature and particulars of the warrant,—describing not only the debtor and the creditor by their names and designations, but also specifying the full particulars of what the debtor is required to do. This is in conformity with the Personal Diligence Act; and it is a sufficient reason for doing so, that the execution only is what is to be registered, in the view of accumulating principal and interest, or of further proceedings; and without the above particulars the registration would not be intelligible. In a case where the execution described the warrant as an ‘extract registered protested note or bill of exchange,’ whereas the true warrant was the extract registered protest only, the Court thought the validity of the execution too doubtful to have justified resort to imprisonment.¹ The date of the warrant must be correctly stated. Where the date, given as that of a Sheriff’s precept of poinding, was 7th November, whereas the true date was 7th December, a charge thereon was suspended. And a poinding was defeated where the execution of the letters of horning upon which it proceeded was of a date obviously erroneous, being prior to the date of the letters themselves.²

WITNESSES.

By the Act 1681, cap. 5, it is declared that none but subscribing witnesses shall be probative in messengers’ executions of interdictions, hornings, or arrestments. And, as the witnesses attest the facts set forth, they ought to subscribe each page, and also the marginal additions, if any, along with the messenger. The Act 1540, cap. 74, required the messenger’s signet or stamp to be impressed on his execution by way of authentication; and the Act 1681, cap. 5, required that the witnesses should be designed in the body of the execution, under pain of nullity; but stamping was dispensed with by the Act 1686, cap. 4, which required the subscription of the messenger and witnesses under pain of nullity; and the Act 1693, cap. 12, directed that all copies (used at service) should bear, at length, and not in figures, the day and date of delivery, and also the names and designations of the witnesses, in the same way as the execution. In a case where the schedule or service-copy of arrestments omitted the name and designation of the witnesses, the arrestments were found null.³ These enactments are still in force, except that now, as already mentioned, the Personal Diligence Act, sect. 32, declares one witness to be sufficient for execution or citation. By the same Act and section, extracts, citations, deliverances, schedules, and executions may be either printed, or in writing, or partly both.

The messenger or officer must have the warrant in his possession; but he is not bound to exhibit it to any one except the debtor.⁴ And it will be presumed that the warrant was in his possession, unless the contrary be proved.⁵

The Act, sects. 5 and 10, declares it competent, at any time within

¹ Glen, 19th Nov. 1841, 4 D. 36.

² Hog, 2d June 1797, M. 8346.

³ Stewart, 22d May 1824, 3 Sh. 56.

⁴ Lermont, 11th July 1699, M. 3096.

⁵ Menzies, p. 293.

year and day after a charge has expired, to register the execution in the General Register of Hornings at Edinburgh; or, in the case of a charge on a Sheriff's warrant, in the particular register of hornings kept by the Sheriff-clerk who has issued the warrant; and such registration is declared to have the same effect as if the debtor had been denounced rebel in virtue of letters of horning, and the said letters, with the executions of charge and denunciation, had been recorded according to the forms in use at the date of the Act. Upon registration, a certificate is given by the keeper of the register, stating the presentment, the name and designation of the party who has presented, the registration, the register, and the date.

Accumulation of principal and interest into one capital sum, bearing interest, formerly arose only when the registration took place at the head burgh of the debtor's domicile.¹ Now it will be observed that the registration may be either in the General Register at Edinburgh, or, where it proceeds on a Sheriff's warrant, in the county register. Formerly, denunciation on letters of horning had the further effect of SINGLE AND LIFERENT ESCHEAT. escheating or confiscating the debtor's whole moveable estate to the Crown; the creditor at whose instance it took place being, in the first place, entitled to payment of his debt out of such estate, if sufficient. And the rents and produce of the debtor's heritable estate, during his lifetime, fell to the feudal superior of his lands, if he continued unrelaxed or unrestored for year and day. The first of these penalties was called the single escheat; the second, the liferent escheat. Both still fall in the case of denunciation for crimes; but, by the Act abolishing ward-holdings in Scotland,² these casualties were abolished in the case of denunciation for civil debts; and they have no place in the case of registration under the Personal Diligence Act.

After expiry of the charge and registration, it is competent to apply WARRANT TO IMPRISON. for warrant to imprison the debtor, as it formerly was to apply for caption against him, after denunciation and registration. The application is made by minute in the Bill-Chamber, commencing with place and date; and, in respect that the charge is expired and registered, craving warrant to search for and apprehend the person of the debtor, and to imprison him till he fulfil the charge; and, if necessary for that purpose, to open shut and lockfast places. Warrant is also craved, to magistrates and keepers of prisons, to receive and detain the debtor accordingly. This minute must be signed by a Writer to the Signet; and, being presented to the Bill-Chamber Clerk, he will, if all is found right, subjoin the deliverance thereon, in the words '*Fiat ut petitur*,' adding the date and his signature. It is essential that the *induciae* shall have expired before the warrant of imprisonment is applied for. Caption raised prematurely is inept.³ The omission of the place and date in the minute, craving warrant to imprison, will render the warrant inept.⁴ Where the name of the debtor

¹ 1621, c. 20.² 20 George II. c. 50, s. 11.³ Lyle, 27th June 1827, 5 Sh. 845.⁴ Sim, 15th Nov. 1845, 8 D. 8.

APPREHENSION OF DEBTOR.

⁸ Johnstone, 9th March 1850, 12 D.
903.

the messenger for the debtor, under the authority and directions of the caption, or warrant of imprisonment, is sufficient.

The messenger's execution, or return of search, in such cases, after specifying the date and other usual preliminaries, bears that the messenger passed to the dwelling-house of the party, or as the case may be, and then and there, or at each of the places named, 'having my blazon displayed upon my breast, and holding the letters of caption (or warrant) and my wand of peace in my hand, in Her Majesty's name and authority, made diligent and strict search for the party, by looking and searching carefully and attentively in and through every part, corner, and apartment of the said dwelling-house (or as the case may be) capable of containing a man, and where it was possible the said party might be concealed, in order to apprehend and incarcerate his person, in terms of the said letters (or warrant); but, notwithstanding of the most strict, diligent, and minute search at the said place, as said is, he could not be found, he having absconded, as I believe, for his personal safety.'

The power of imprisonment expressly for debt was, in comparatively modern times, conferred on the Justices of the Peace by the Small Debt Act, and upon the Sheriffs by 6 Geo. IV. cap. 24, the original Small Debt Act for the Sheriff Courts. But imprisonment is now incompetent, unless when the debt exceeds £8, 6s. 8d., exclusive of interest and expenses, or when the claim is *ad factum præstandum* [5 & 6 Will. IV. cap. 70]. But by 19 & 20 Vict. cap. 46, imprisonment under 5 Geo. IV. cap. 96, as to the settlement of disputes between masters and workmen by arbitration is exempted from the Act of Will. IV. Moreover, the Abbey of Holyrood House, including Arthur Seat and grounds adjacent, form a sanctuary within which debtors, by conforming to certain regulations, can obtain protection from the diligence of creditors against their persons, except that if, after apprehension, they have escaped and have retired to the Abbey, they may be then followed and apprehended if pursued immediately after the escape;¹ and that they may be imprisoned in the Abbey Debtors' Jail for debts contracted within the Sanctuary itself.² In the ancient law-language the Sanctuary is called 'The Girth,' as forming a circle within which the person is safe from imprisonment for debt. And the Duke of Hamilton is Master of the Girth,—i.e., Keeper of the Abbey, within which he exercises jurisdiction by a bailie.³

The debtor, after being apprehended, may desire the opportunity of applying to some friend to engage to produce or present him to the messenger on some future day, in order to his being then incarcerated, in case the debt shall not in the meantime be paid; and the messenger may grant him the indulgence of a little delay for that purpose. If a friend, approved by the creditor, agrees to present the debtor, he will

¹ Darling, p. 178.

² Berry, 24th Feb. 1820, F. C.

³ See Bell's Law Dictionary, *vocibus* Girth and Sanctuary, and Menzies, p. 301.

grant a bond of presentation, which is an obligation proceeding on the narrative that the debtor is in the messenger's custody, in virtue of the warrant, for not fulfilling the charge, the particulars of which will be stated, and that the creditor has agreed to delay putting the warrant into further execution on condition of the bond being granted. He therefore binds himself and his heirs, etc., in usual form, to present the person of the debtor to any messenger or officer of the law holding the warrant, within a specified place (usually the messenger's office), the precise position of which will be stated on the day agreed on, and at a specified hour precisely, and that without any sist (or stop), suspension, protection, or other legal impediment to the warrant being then put in force. And, failing such presentment, he binds himself and his heirs, etc., to pay to the creditor the amount of the debt, with interest, penalty, if any, and expenses.

A clause of registration for execution may be added ; but it is not of any particular value, as there can be no summary diligence to enforce the obligation to present ; and, as regards payment, the obligation is conditional, and the fact of non-presentment has to be proved, in order to make the obligation effectual. An ordinary action is requisite in order to enforce payment. The obligation must be in writing ; it cannot be constituted by mere parole proof¹. When the bond of presentation is in the above terms, it will be fulfilled if the obligant presents the person of the debtor at the time and place specified. But though this is a critical matter, and substantial *bond fide* fulfilment is indispensable, cases in which literal fulfilment does not take place are to be judged of by their own circumstances. Thus, in one case, the presentment should have been at one o'clock precisely, and the debtor was in attendance at half-past twelve, but went out for a few minutes, the creditor not having arrived. The creditor came at one, and left at a quarter past one. The debtor returned before half-past one, and sent immediate notice to the creditor that he was in attendance. The creditor claimed on the bond of presentation as forfeited ; but the Court thought him too sharp, and held that the bond had been duly fulfilled, observing that very precise terms or expressions would be required in order to produce the rigid effect contended for by the creditor.² The cautioner, however, who had granted the bond of presentation, was refused his expenses ; the Court being desirous 'that no encouragement may be given to negligence or want of punctuality.' It may happen, however, that the bond is to make the presentation before a certain day, or without specifying any particular hour ; and, in that case, notice of the time at which the presentation is to take place must be sent to the creditor, that he may be prepared to put his diligence into execution.³ The debtor's death, of course, frees the obligant ; likewise such sickness as disables him from attendance without risk to his life. But this should be duly certified by

PRESENTMENT
OF DEBTOR.

¹ Chaplin, 5th Feb. 1842, 4 D. 616.

³ Macfarlane, 10th June 1834, 12 Sh.

² M'Gown, 27th Nov. 1829, 8 Sh. 142. 99.

a medical man. The presentation should take place as soon as the impediment is removed. And, of course, due notice should previously be given to the creditor, of the time and place at which to meet the debtor. And, if the non-fulfilment arises from the fault or neglect of the debtor,—for instance, the debtor's enlistment as a soldier,¹ or his betaking himself to the Sanctuary,²—his cautioner will not be liberated.

After the liability of the obligant has been incurred, the creditor must keep in mind that the obligant is really and truly a cautioner, and must take care not to discharge the proper debtor, or even to grant him (by positive contract) time for payment of his debt, or other indulgence.³ The obligant, however, who incurs liability under a bond of presentation, has no recourse against a proper cautioner for the debt. The proper cautioner suffers by the failure to present the debtor, and is in no way responsible for the indulgence granted to him, nor for the non-presentation. On the contrary, the failure to present has taken away one of the legal compulsitors for enforcing fulfilment of the proper debtor's obligation, and the proper cautioner is relieved.⁴

In reference to Exchequer causes, the Court of Exchequer Act,⁵ which came into operation on 12th November 1856, has sundry provisions as to diligence against the person, to which it seems necessary here to call your attention.

By sect. 38, all bonds or obligations in the Court of Exchequer form are declared probative, equally as if duly executed and attested; and all bonds or obligations to Her Majesty are capable of registration for execution, in like manner as if they contained a formal clause of registration; and all diligence and execution is competent thereon, equally as upon a bond containing such clause.

By sect. 28, the extracts of all decrees under said Act, and also the extracts of decrees proceeding on bonds or other obligations to Her Majesty, on which execution may competently proceed, registered in the Books of Session or of any Sheriff-Court, are to be, as nearly as possible, in ordinary form, so far as consistent with the provisions of said Act; except that decrees in favour of Her Majesty shall contain warrant to Sheriffs to charge and execute diligence in terms of the schedule (G) annexed to the Act, in lieu of the warrant to charge in ordinary cases. According to said schedule, it would appear that the Sheriff of any county may execute any decree, but the decrees may also be put in execution by any messenger-at-arms or sheriff's officer.

By sect. 29, the Sheriff, to whom a decree is delivered to be enforced, is required to put the same to execution with all due despatch, and to take all lawful and proper measures to enforce payment or implement

¹ Henderson, 22d July 1710, M. 1809.

² Douglas, 17th Dec. 1842, 5 D. 338.

³ See Dixon & Douglas, 12th Feb. 1847, 9 D. 679.

⁴ Graham, Feb. 1731, M. 3364; Smith, 11th Dec. 1811, F. C.

⁵ 19 & 20 Vict. cap. 56.

by means thereof. He is entitled to receive payment or implement, and thereupon to discharge the decree, but is to account for his intrusions as therein specified.

By sect. 31, the Sheriff is empowered to cause charge the Crown debtor to pay or perform, in terms of the decree, under pain of pointing and imprisonment; and by sect. 33, at any time within year and day after expiry of the days of charge, which are six, to obtain the execution recorded, by the Sheriff-clerk of the county within which the charge was given, in the register of hornings for such county; and, by sect. 34, on the execution being so recorded, to issue warrant of imprisonment against the debtor. The procedure, as detailed in the Act, is generally in form and effect as nearly as possible the same as that authorized by the Personal Diligence Act, in the case of similar procedure at the instance of private parties against their debtors. But by sect. 42 of the Exchequer Act, it is declared that nothing contained in said Act shall affect any preference of the Crown in competition with other creditors; and that, in all questions of preference or competition, the execution of a charge by or for the Crown, and, in the case of deceased Crown debtors to whom no such charge had been given, the execution of any arrestment or pointing by or for the Crown, is declared equivalent to the *teste* of a writ of extent, according to the then existing law and practice.

CHAPTER III.

PERSONAL POINTING.

WE have now to consider personal pointing, being the diligence whereby the debtor's moveables are appraised and sold, and the price made over to the creditor; or, if not sold, the moveables themselves are valued over to him, to the extent or to account of his debt. What we are now to examine is to be distinguished from real pointing, or pointing of the ground as it is called, and which, though attaching moveable effects only, cannot proceed without a heritable or real security affecting the ground or subjects upon which the pointed effects are situated; and which therefore belongs to the department of real diligence.

The privilege of a creditor to attach his debtor's moveables, in satisfaction of the debt, appears to have been the earliest mode of compulsory payment recognised in the law of Scotland. It was originally exercised under brieves from the Royal Chancery addressed to the Judge Ordinary of the bounds. Subsequently, the Judges Ordinary appear to have adopted the practice of enforcing their own decrees, by means of warrants of pointing directed to their own officers. The Court of Session, on its establishment, assumed the same right; and, on its decrees, letters of pointing were issued under the Royal Signet, addressed at first to the Sheriffs of counties, and thereafter to messengers-at-arms, as

Sheriffs in that part. Poinding might therefore proceed on the decrees, either of Inferior Courts, in which case it was limited in its execution to the bounds of their jurisdictions; or on those of the Supreme Court, in virtue of which it might be executed in any part of Scotland. And by the Act 1661, cap. 29, the Court of Session was authorized to issue letters of poinding, on production of the decree of the Inferior Judge; and thereby to give the means of attaching the moveables of the debtor, wherever found within Scotland, for payment of the debt.¹

The warrant, annexed to a decree in virtue of the Personal Diligence Act, contains in one the authority to charge the debtor and to poind his moveables.² So also do the warrants contained in the extracts of decrees pronounced under the Exchequer Court Act of 1856, and in the extracts of decrees proceeding upon bonds or obligations to the Crown, on which execution may competently proceed, registered in the Books of Session, or of any Sheriff Court. These extracts are to be, as nearly as may be, in ordinary form, so far as consistent with the provisions of said Act; except that in extracts of decrees on bonds or obligations to the Crown, and extracts of decrees for payment of debts due to the Crown, the warrant to charge and execute diligence is addressed to Sheriffs (as already stated), in terms of schedule G annexed to said Act, though capable of being executed by any messenger-at-arms or sheriff-officer.³ Poinding, however, can proceed only after expiry of the days of charge,⁴ with this exception, that in the case of deceased debtors to the Crown by bond, or other obligation, on which diligence may competently proceed, or under any decree for payment of a debt due to Her Majesty, it is lawful to register the bond, or other obligation, after, equally as before, the deceased's death; and in virtue of the extract, and on affidavit being made by any person that the debtor is deceased, it is further lawful, without the form of any previous charge, to poind the moveable effects of the deceased, in the like manner, and to the same effect, as if the deceased were still in life, and had been duly charged, and the charge had expired.⁵

The proceeding in poinding at the instance of private parties is now regulated by the Personal Diligence Act, sects. 23 to 32 inclusive; and at the instance of the Crown, by said Act and by the Exchequer Act, sect. 32; but I do not consider it necessary to examine the forms. In poindings at the instance of the Crown, it is lawful for the Sheriff to attach the debtor's 'whole moveable effects without exception, including 'bank-notes, money, bonds, bills, crop, stocking, and implements of husbandry of all kinds.'⁶ When the proceedings are at the instance of private parties, it has been questioned, but not decided, whether bank-notes can be poinded.⁷ Growing corn can be poinded;⁸ but wheat

¹ Juridical Styles, iii. 567.

² Schedule No. 1.

³ Exchequer Act, s. 28.

⁴ 1669, c. 4; Personal Diligence Act, s. 4; and Exchequer Act, s. 32.

⁵ Exchequer Act, s. 36.

⁶ *Ibid.* s. 32.

⁷ Alexander, 10th February 1826, 4 Sh.

439.

⁸ Ballantine, 15th June 1709, M. 10,526.

merely braided, and clover grass, cannot.¹ During the season of labouring the ground, plough-goods, or implements of husbandry, oxen, horses, and other goods pertaining to the plough, cannot be poided, if the debtor has other goods that can be poided.² Goods which one has sold, but has not delivered to the purchaser, can be poided or arrested by the seller, in his own hands, for a debt due to him by the purchaser, at any time before a re-sale of these goods has been intimated.³

SHIPS.

Poiding is expressly allowed for the attachment of ships, and their tackle, etc., in the special class of cases relative to seamen's unpaid wages, etc., which is specified under sect. 523 of the Merchant Shipping Act.⁴ In other cases, poiding is not the appropriate diligence for attaching ships; arrestment is the diligence to be resorted to. Neither is poiding competent to attach goods of which the debtor is only one of two or more joint proprietors;⁵ or goods in which he has only a qualified or a temporary interest, for example, a liferent.⁶ The diligence is excluded also as to effects within the Palace of Holyrood, which cannot be entered to execute diligence; not, however, because of the privilege of sanctuary, but because it is a royal residence.⁷

ARRESTMENT.

Arrestment is the diligence by which the debtor in a moveable debt or obligation is interpellated from making a payment or delivery to his creditor, until the debt due to the arrester by that creditor is paid or satisfied. The party using the arrestment is called the arrester; the party in whose hands the sum or fund is arrested, the arrestee; and the party to whom that sum or fund belongs, the common debtor; because he is debtor to the arrester, and (as generally happens) to other parties competing for the arrested sum or fund. Arrestment is also, in general, the proper diligence for attaching ships or shares of ships. A limited exception from that rule was made by special Statute in 1854, as has been explained.

The diligence of poiding is available as to goods and effects in the debtor's own hands, and corporeal moveables in the hands of third parties; and either arrestment or poiding is competent at the instance of the seller of goods, for a debt due to him by the purchaser, as above explained. Arrestment used by the seller in his own hands, in security of a general balance due by the purchaser, was found preferable to the right of a sub-purchaser of goods remaining in the seller's hands undelivered, such right not having been intimated to the seller until after the first purchaser's bankruptcy,

¹ Elders, 5th July 1833, 11 Sh. 902.

² 1503, c. 98.

³ Mercantile Law Amendment Act, 19 & 20 Vict. c. 60, s. 3.

⁴ 17 & 18 Vict. c. 104.

⁵ Fleming, 2d Dec. 1828, 7 Sh. 92.

⁶ Scott, 13th May 1837, 15 Sh. 916.

⁷ Earl of Strathmore, 18th Feb. 1823, 2 Sh. 223; as reversed, 22d Feb. 1826 2 Wil. and Sh. App. 1.

and after the arrestment had been laid on.¹ Poining, moreover, is a diligence in execution only, which cannot proceed without a previous decree, either in a regular suit, or of registration. Poining, therefore, cannot be made operative as a security to preserve the debtor's moveables for the creditor during the discussion of his claim. And there are certain kinds of property which private parties cannot attach by poining, though the Crown can,—such as obligations to pay money to the debtor. In such cases, the private creditor has his remedy by arrestment, the execution of which, as long as it remains in force, debars the arrestee from paying or delivering the sum or fund in his hands to the common debtor.

When the claim of the arrester is duly constituted by bond, bill, or other probative writing, or by decree, the arrestment used is a diligence in execution, having for its object to stop or detain the fund in the arrestee's hands, with a view to its immediate payment or transference by a process of furthcoming, or otherwise, to the arrester in satisfaction of his debt. ARRESTMENT IN
EXECUTION.

But it may happen that the arrester's claim consists of the balance of an account, or other demand, which is not liquid, and which requires to be constituted. In such cases, arrestment is competent equally as when the claim is liquid; but, until the claim is constituted, the arrestment operates as a diligence in security only, and for the purpose of stopping or detaining the fund, so as to be available to the arrester in case, and after, his debt shall be constituted. There is another case of arrestment in security (and more strictly so), where a creditor has a liquid ground of debt, but the term of payment has not come, and the debtor is *vergens ad inopiam*; upon such a document he can use arrestments to the effect of detaining the fund, until caution is found in the Books of Council and Session that the same shall be furthcoming when the term of payment of the debt arrives. The general rule is that arrestment, to secure a debt payable at a future time, is competent only when the debtor is *vergens ad inopiam*.² The question whether arrestment, followed by decree of furthcoming, at the instance of an annuitant, could be made available in competition with other arresting creditors, for security of the future payments of a life annuity,—that is, for a future and contingent debt,—was discussed, but not decided in the case of Macdonald.³ The Court were equally divided on the question whether the diligence was competent, and no decision was pronounced, the case having been compromised. ARRESTMENT IN
SECURITY.

We have, lastly, arrestment *jurisdictionis fundandæ causâ*, that is, for the purpose of founding or constituting a jurisdiction on the part of the Court of Session against a foreigner, with reference to whom the Court would have no jurisdiction in respect of his domicile. It is part of the law of Scotland, that, when a party has property within the jurisdiction ARRESTMENT
TO FOUND
JURISDICTION.

¹ Wyper, 27th February 1861, 23 D. 606.

² Pitmedden, 17th July 1678, M. 813.

³ Macdonald, 15th Jan. 1811, F. C.

of the Court of Session, he may be sued on a personal action before that Court, just as if he actually dwelt within its jurisdiction.¹ Letters of arrestment for the above special effect being raised and executed, and effects being thereby actually attached, the claimant can raise an ordinary summons or action against the foreigner in the Court of Session.² The debtor cannot be required to appear in the Sheriff Court; but it is in his option to waive his right to object, and to make appearance in that Court.³

After the summons is raised, the creditor ought to arrest of new on the dependence, that is, on the executed summons, in security of his debt; the first arrestment having been *ad fundandam jurisdictionem* only, and not for the purpose of detaining the fund for behoof of the creditor. An opinion was indeed stated from the Bench, in the case of White, that arrestment *ad jurisdictionem fundandam* imposed a *nexus* upon the arrested property; but the point before the Court, and with reference to which that opinion was expressed, was whether such a *nexus* was created as to justify a multiplepounding; and in practice the arrestment *ad jurisdictionem fundandam* is never relied on as a means of securing the fund arrested for satisfying the claim of the arrester.⁴

WARRANTS OF
ARRESTMENT
IN EXECUTION.

Arrestment in execution proceeds on warrants of various descriptions:—

1. These may be simple letters of arrestment, which are obtained by presenting a bill or petition to the Lords of Session through the Bill-Chamber. The grounds may be any liquid document of debt, registered or unregistered, on presentment of which the Bill-Chamber Clerk writes the deliverance '*Fiat ut petitur*.' This is a warrant to the Keeper of the Signet to stamp or impress the signet upon the letters of arrestment, which contain a recital of the grounds of debt, and authorize the arrestment of all the debtor's goods and effects, to remain until the arrester be completely paid. The letters may also contain warrant to arrest in the hands of persons furth of Scotland. Such letters must be subscribed by a Writer to the Signet. They bear the date of the Bill-Chamber warrant, and the Keeper of the Signet adds the date of signeting.

2. Letters of horning and pointing always contain warrant to arrest. This is founded on uniform and immemorial usage. There is no statutory authority for it, and it seems to have originated in the general right of a creditor to attach, by legal diligence, his debtor's moveables, wherever he can find them.

3. Under the Personal Diligence Act, sects. 1 & 2, the warrants annexed to extracts of decrees of the Court of Session are authorities to

¹ Lindsay, 20th Nov. 1855, 18 D. 62; affirmed 23d Feb. 1858, 3 Macq. 99.

² Bertrams, 6th March 1821, F. C.; Houston, 3d Feb. 1824, 2 Sh. 672; affirmed

20th May 1825, 1 Wil. & Sh. 199; Harvey, 21st June 1831, 9 Sh. 785.

³ White, 30th June 1846, 8 D. 952.

⁴ See Juridical Styles, iii. 553, note 3.

arrest, upon which arrestments may be used in like manner as if letters of arrestment or horning, containing warrant to arrest, had been issued under the signet. By sect. 8 of the Personal Diligence Act, similar extracts can be obtained, at the instance of parties having or acquiring right to decrees, in the old form; and by sect. 9, the same provision is made with regard to the decrees of Sheriffs, and for new extracts with warrants for arrestment, at the instance of parties having or acquiring right to Sheriff's extracts, issued before the commencement of the Act. Extracts of ordinary decrees, and of decrees on registered bonds and obligations obtained under the Exchequer Act of 1856, likewise contain warrants to arrest, in ordinary form, so far as consistent with the provisions of the Exchequer Act, except that in extracts or decrees on bonds or obligations to the Crown, and extracts of decrees for payment of debts due to the Crown, the warrant is addressed to Sheriffs, though capable of being executed by messengers-at-arms or sheriff-officers.¹

Upon letters of horning, and consequently upon extracts obtained under the Personal Diligence Act, or Exchequer Act, arrestments may be used before giving a charge to pay.²

Arrestment in security, when the claim is not liquid, formerly required separate letters of arrestment, founded on the summons raised for constituting the debt. And the summons required only to be signeted in order to authorize the issuing of the letters. It was at one time necessary that the summons should be executed, as well as signeted.³ But by the Acts 33 Geo. III. cap. 74, and 54 Geo. III. cap. 137 (the Bankrupt Acts of the time), arrestment was allowed before execution of the summons. The same provision is made by the Personal Diligence Act, sect. 17. Now, by sect. 16 of that Act, the warrant to arrest may be embraced in any summons before the Court of Session, for payment of any sum of money; and by the Exchequer Act, sect. 10, every summons to be raised on behalf of Her Majesty, as thereby authorized, may contain warrant to arrest on the dependence; upon which summons and warrant ARRESTMENT ON THE DEPENDENCE. to arrest, all diligence shall be competent, with the like operation and effect as upon an ordinary summons or warrant to arrest on the dependence contained therein before the Court of Session. But arrestment on the dependence is only in security, as before explained. And such arrestment, conjoined with the summons, will fall to the ground if the summons is not executed within twenty days after the date of the execution of the arrestment, and called in Court within twenty days after the diet of compearance; or, when the vacation prevents such calling, on the first calling day of the next session. Arrestment on a depending action is competent at any period of the litigation, including the time of appeal to the House of Lords.⁴ And arrestment is competent upon such action, though the action is avowedly brought for the sole purpose of

¹ Exchequer Act, s. 28.

² Weir, 2d Feb. 1814, F. C.

³ Frskine, iii. 6. 3.

⁴ Hadinton, 8th March 1822, 1 Sh. 397.

obtaining security by the use of that diligence during the dependence of a Chancery suit in England.¹

Arrestment *ad jurisdictionem fundandam* requires separate letters. It is preceded by a bill or petition to the Lords of Session, on which a deliverance is given by the Bill-Chamber Clerk. And the bill is passed as matter of course, and without warrant. The summons, following on the arrestment *ad jurisdictionem fundandam*, may, like other summonses for payment of sums of money, contain warrant to arrest. But arrestment *ad fundandam jurisdictionem* is not necessary when the process to be raised is a multiplepoinding; the existence of the fund *in medio*, for disposal of which that process is raised, being equivalent to such arrestment.²

VITIATIONS IN ARRESTMENTS.

The rules regarding vitiations by erasure or otherwise are the same in the case of arrestments as in that of other diligence. Where an arrestment had followed on a 'dependence,' and, in narrating the words of the Bill-Chamber deliverance, following the '*fiat ut petitur*,' the word 'dependence' had been written on erasure, the arrestment was held ineffectual.³ Certainly rules as strict would be observed now in the case of warrants of arrestment contained in the summons itself.

MODE OF EXECUTING ARRESTMENTS.

I will now notice the mode of executing arrestments. When at the instance of a private party, this is done by a messenger-at-arms or officer serving upon the arrestee a copy or schedule, by which, in virtue of the warrant (and in Court of Session cases, in Her Majesty's name and authority), he fences and arrests, in the arrestee's hands, a specified sum owing by the arrestee to the common debtor, or to others for the common debtor's behoof,—with all goods, gear, debts, money, and moveable effects in the arrestee's hands, belonging to the said common debtor, all to remain under sure fence and arrestment, at the instance of the arrester, until he be satisfied and paid of the debt, mentioned in the warrant, or until caution be found to make the arrested funds forthcoming as the case may be. Of this service, an execution is returned by the messenger annexed to the letters of arrestment; and the service copy and execution are subscribed, attested, and otherwise authenticated, in the same way as the execution of charge on the warrant to charge, annexed to decrees. When at the instance of the Crown, the procedure is the same, except that the arrestment can be executed by the Sheriff of any county.⁴

ARRESTEE.

By the Mercantile Law Amendment Act, sect. 3, it is competent, as we have seen, for the seller of goods, which he has not yet delivered, to arrest the goods in his own hands, so long as no subsequent sale of the goods has been intimated to him. Except in that case, the arrestment must be in the hands of a third party; what is required is, that the arrestee shall himself be directly debtor to the common debtor, or shall hold funds in his hands for behoof of, or belonging to, the common debtor.

¹ Fordyce, 2d June 1842, 4 D. 1334.

² See Crockett, 9th Dec. 1852, 15 D. 202.

³ Forbes, 4th March 1847, 9 D. 806.

⁴ Exchequer Act, s. 28, and schedule G.

In general, all moveable property belonging to a debtor, and in the possession of third parties as custodiers thereof, can be arrested,—for example, money deposited in bank; balances due by bankers or others on account; the rents of lands in the hands of tenants; the unpaid price of lands sold;¹ and debts due by the partner of a company, to the company, may be arrested in the hands of the partner by a creditor of the company.² The sums due by bonds, contracts, and other personal obligations, upon which no infestment has followed, are declared, by the Act 1661, cap. 51, to be arrestable although bearing clauses of annual-rent. And, under this Statute, the sum in a heritable bond, on which infestment had been taken, but not registered, was found arrestable.³ The sum in a policy of assurance also is arrestable during the life of the party assured; and, if he dies before the next premium payable for keeping the policy in force falls due, the arresting creditor will certainly have right to the sum in the policy.⁴ In Strachan's case, the question, whether the arrestment would subsist after payment of another premium, was reserved. Ships, or shares of ships, are arrestable; and it is not necessary to obtain a special warrant for their arrestment from the Lord Ordinary on the Bills.⁵ When the ship is complete, the arrestment is made by affixing the messenger's copy or schedule to the mainmast, and chalking above it the royal initials, 'V. R.' If the ship is on the stocks, it may be arrested there; in which case the copy is affixed to the stern.⁶ And it is competent to arrest a ship so as to detain it for a debt owing by a person who is only part-owner.⁷

WHAT
SUBJECTS ARE
ARRESTABLE?

But bills of exchange are not arrestable in the hands of an indorsee. Freedom of currency requires that they be free of such attachment.⁸ Sundry sums, moreover, are, from the circumstances in which they are placed, or, from their nature, exempt from liability to arrestment. For example, sums which, previously to the arrestment, have been competently destined or appropriated to a particular purpose, which the arrestment would defeat. Thus, where money, belonging to a trust, had been consigned in bank, it was held primarily applicable towards payment of the expenses of the trust-management, and the Court would not allow that purpose to be defeated by an arrestment at the instance of one of the trustees for a debt due to himself.⁹ In like manner, money consigned, in order to be applied to the redemption of a wadset, was held not arrestable by a creditor of the consigner.¹⁰ But, when the wadset has been declared to be dissolved and extinguished, the money is no longer subject to the purpose of consignment, and can be

SUBJECTS NOT
ARRESTABLE.

¹ Grierson, 25th Feb. 1780, M. 759; Douglas, 29th June 1796, M. 16,213; Pindar, 27th May 1824, 3 Sh. 69.

² Hill, 13th Nov. 1849, 12 D. 46.

³ Stewart, 20th Feb. 1706, M. 705.

⁴ Strachan, 19th June 1835, 13 Sh. 954.

⁵ Clark, 17th June 1853, 15 D. 750.

⁶ See on this subject Mill, 18th Dec. 1812, F. C.

⁷ M'Aulay, 6th March 1821, F. C.

⁸ Cases cited in Dick, 1st June 1815, F. C.

⁹ Wight's Trustees, 12th Dec. 1840, 3 D. 243.

¹⁰ Mackenzie, 22d June 1739, M. 713.

arrested. Moreover, arrestment is the proper diligence, and the arrester will be preferred to an inhibitor.¹ Upon the same principle, funds properly alimentary cannot be arrested; being destined by their constitution to a particular purpose. The amount must not be excessive; but it has been held that an income of £1800, provided to an earl, was not, in the circumstances, beyond the limits of what can be declared alimentary so as to be exempt from diligence;² nor an alimentary annuity of £200 to the second son of a lady of property.³ Kings' pensions, being designed for aliment, are not arrestable, though not expressly declared alimentary.⁴ For the same reason, and in terms of various Acts of Sederunt, the salaries of Judges in the Court of Session are not arrestable. Nor are servants' wages or fees, except to the extent of the excess beyond what is requisite for their proper maintenance; nor the wages of labourers and manufacturers, so far as necessary for their subsistence.⁵

**FUTURE DEBTS
NOT ARREST-
ABLE.**

Debts, in order to be arrestable, must be due at the time of the arrestment; future debts, not yet payable, are not arrestable. But this rule does not apply to debts which are legally due, though the term of payment has not come. Thus the principal sum of money actually lent, though payable in terms of a bond therefor one year hence, is arrestable now; and so also is the interest due at this date. The future interest thereon is not arrestable, independently of the principal, by proceedings taken now. Such interest must be arrested from time to time as it becomes due. Under this rule, arrestments used now, of the rents of lands and interest of heritable debts, would attach only sums due for the past and current terms.⁶ The same rule applies to the case of annuities. But, though the arrestment may be validly laid on, there will be nothing due at the end of the term, if the annuitant dies before that time comes,⁷ unless the annuity is affected by the Apportionment Act; in which case the proportion of half a year's annuity, corresponding to the period from the term last past to the day of the annuitant's death, will be attached.

**ARRESTMENT
USED ON
TERM-DAY.**

The term-day is the last day of the term, and arrestment used on that day will attach only the past half-year's rent or interest, because the whole of that day must elapse before the new term begins. Thus, arrestment used on 11th November was held not to affect the rent due on 15th May following.⁸ The legal, and not the conventional term, however, is here meant. Rents and interests are legally due at the end of each half-year during which the lands have been possessed by the tenant, and the money had in loan by the debtor; but, by agreement of parties, the rents may not be payable for six, nine, or twelve months after the term of legal liability. A similar agreement as to the interest of money is equally competent, but wholly unknown in present practice. An arrestment used in January, therefore, will attach the rents legally due for the

¹ Stormonth, 24th May 1814, F. C.

² Harvey, 13th June 1840, 2 D. 1095.

³ Smith, 29th May 1855, 17 D. 778.

⁴ Dick, 22d December 1676, M. 10,387.

⁵ Small Debt Sheriff-Court Act, 7 Will. IV. & 1 Vict. c. 41, s. 7.

⁶ Livingston, 10th March 1795, M. 769.

⁷ Corse, 31st Jan. 1705, M. 767.

⁸ Wright, 23d June 1802, M. 15,919.

current term's possession at Whitsunday following, although they may not be payable until at or after Martinmas.¹ It is no objection, however, to an arrestment as a legal diligence, that the sum or claim arrested is the subject of legal question, and may or may not be found due to the common debtor. If not due, the arrestment will attach nothing. If due, it will secure the sum or claim, which is not a future debt, though the decree ascertaining the debtor's liability may bear date after the arrestment.²

The arrestments must of course be used in the hands of the proper party. If the arrestment is not in the hands of the arrester himself, the arrestee must be indebted to the common debtor, or legally and *bond fide* in possession of the fund sought to be attached. If the unpaid price of an estate which has been sold is to be arrested, the arrestment will be used in the hands of the purchaser.³ Where a tenant's stocking was sold, in virtue of the landlord's hypothec, and the proceeds were in the hands of the commissioner appointed to superintend the sale, arrestment in his hands was found effectual, subject always to the landlord's claim.⁴ Again, when a party had abandoned his domicile in this country, and granted a mandate to his law-agent to take charge of and dispose of his furniture, the agent was held to be sufficiently in possession to validate arrestments used in his hands at the instance of the creditor of his constituent.⁵ In an ordinary case, however, it is not enough to arrest in the hands of the factor for the arrestee, because he is accountable, not to the common debtor, but to the arrestee; and, on that principle, arrestment in the hands of trustees for a party owing a sum to the common debtor was found ineffectual. The trustees were debtors, or accountable to, the party here referred to, not to the common debtor.⁶ When the debtor is deceased, the Court of Exchequer Act, in the same section as that already quoted with reference to personal poinding (sect. 36), declares it lawful to the Sheriff, in the same cases and circumstances as those before specified in regard to personal poinding against a deceased debtor to the Crown, and in virtue of a similar warrant, to cause arrest at once, in the hands of any person indebted, or supposed to be indebted, to the deceased debtor.

In the case of private parties there is no such privilege when the debtor is deceased. But in such cases, if the executors of the deceased have completed their titles to his personal estate by confirmation, arrestment in the hands of the executors is equally competent with arrestment in the hands of the debtor himself when alive.⁷ Of course the rule is the same when the executors have completed their titles by obtaining possession, or in any other way. The case of the executors of a person deceased, however, is to be distinguished from that of the trustees in a

¹ Handyside, 15th Jan. 1813, F. C.

² Wardrop, 19th Dec. 1744, M. 4860.

³ Creditors of Bonjedward, 24th Nov. 1753, M. 743.

⁴ Macfarlane, 20th Nov. 1823, 2 Sh. 505.

⁵ Brown, 26th Nov. 1850, 13 D. 149.

⁶ Campbell, 12th Dec. 1752, M. 742.

⁷ Globe Insurance Co., 16th Feb. 1849, 11 D. 618; affirmed, 14th August 1850,

7 Bell's App. 296.

ARRESTMENT
MUST BE USED
IN HANDS OF
PROPER PARTY.

trust created for behoof of the creditors generally of the common debtor, which all the creditors are bound to recognise. The executors are simply the representatives of the deceased in his moveable estate, and as such are bound to pay, *primo venienti*, after the lapse of six months from the deceased's death, as far as their funds will go. But in the case of the trust, the funds are no longer properly in the debtor's possession. He has handed them over to the trustees for the special purpose of being applied in payment of his debts, and none of the creditors who are to take the benefit of the trust can attempt to withdraw from it more than their proper share of the funds. Arrestment in the trustees' hands, at the instance of a creditor of the truster, is, therefore, incompetent in such case. The proportion of the trust-funds belonging to any one of the creditors may, however, be validly arrested in the trustee's hands, at the instance of a creditor of such creditor.

POSSESSION BY
ARRESTEE.

The arrestee, as I have already said, must be actually the holder, or in possession, of the fund or subject at the time the arrestments are used. Thus arrestments, in the hands of a consignee of goods, used before arrival of the goods, does not attach the goods subsequently coming to his hands.¹ And when the executors, or next of kin, of the deceased holder of the fund have not completed their title by expediting confirmation as executors to him, or in some other way, they are not legally in possession; and arrestment in their hands is not the proper form of diligence by which to secure the fund. Arrestments used in the hands of such executors will be of no avail.² In such case, the creditors should obtain themselves confirmed executors-creditors to the deceased. The mode of proceeding, with a view to obtaining confirmation as executor-creditor, will be fully explained when we come to the subject of the completion of titles to the personal estate of a person deceased. In the meantime, you may be referred to the case of *Smith and Others*,³ where the nature and effect of such confirmations are fully discussed and explained. They are, in fact, more of the nature of diligences at the instance of the creditors for securing the estate of the deceased, or a portion of it, in payment of the debts due from the deceased to them, than proper steps of completing titles to such estate or portion of it.

The possession of the arrestee must be *bond fide* and complete. Thus, when two parties occupied separate portions of the same cellar with their respective goods, arrestment in the hands of one of them for the debt of the other was found of no avail, because he was not the custodier or possessor of the goods sought to be arrested.⁴ Further, the tenant of a furnished house does not possess the furniture in such a character as to make it arrestable in his hands.⁵ A horse, standing in a smithy to be

¹ *Stalker*, 9th Feb. 1759, M. 745.

² *Atkinson*, 14th Jan. 1808, M. App. Service and Confirmation, No. 3.

³ *Smith and Others*, 27th June 1862, 24 D. 1142.

⁴ *Hunter*, 9th Jan. 1733, M. 736.

⁵ *Davidson*, 11th Dec. 1784, M. 761.

shod, is not arrested by serving a copy on the smith, whose custody is too transient to authorize arrestment as in his hands.¹ Neither is a debtor's horse, standing in the stable of a friend, with whom the debtor is a guest at the time; nor are effects of the same party, whilst placed in a neighbouring inn, arrestable in the hands of the friend or innkeeper.² In all such cases poiding would be the proper diligence.

In using arrestments in the hands of trustees under any trust, or of the executors of a deceased party, it is probably sufficient to serve the copies on a quorum, if the majority be required to make a quorum. But the safe course is to serve the copies on all. Where service was made on only two of six trustees, the arrestment was held inept.³ And, when the arrestee is incapable of acting for himself (as, for example, a minor with guardians), the safe course is to arrest in the hands of the guardians as well as of the minor; though it has been held sufficient to arrest in the minor's hands.⁴ And such service should be personal. It would not be advisable, in cases of arrestment, to rely on edictal service against guardians. For, where the arrestee *bond fide* paid away the funds subsequently to the arrestment, of which, though previously laid on, he was, without any fault, entirely ignorant, the payment was held effectual, and the arrestment was rendered practically unavailing.⁵ The same principle is embodied in the Act 19 & 20 Vict. cap. 91, sect. 1, in FOREIGN
ARRESTEES. reference to foreign arrestees, against whom arrestments are executed by leaving schedules or copies at the Office of the Keeper of the Record of Edictal Citations, in the same way as in the case of charges.⁶ The Act of Victoria provides, as to such cases, that the arrestment shall not interpel the foreign arrestee from paying to the common debtor, unless it be proved that such arrestee was in the knowledge of the arrestments. This enactment, which is merely the renewal of a similar provision in the Bankrupt Act, 54 Geo. III. cap. 137, sect. 3, is intended for the protection of debtors abroad who may pay in ignorance of the arrestments. And, in order to make an arrestment effectual, it is very advisable in this case, as has been recommended in the case of the intimation of an assignation, that, when the arrestment is used edictally, intimation should be given to the arrestee, and also to any agent he may have in this country, by letters through the post-office. Such intimation, however, is not necessary to make the arrestment valid, in competition with a subsequent arrestment duly intimated. The object of the Act is, not to affect preferences amongst arresting creditors, but only to protect foreign debtors.⁷

As regards the effect of the arrestment, the Court of Exchequer Act, EFFECT OF
ARRESTMENT. sect. 30, declares that arrestment at the instance of the Crown shall operate to transfer to the Crown, preferably to all other creditors of the

¹ Neilson, 20th Feb. 1821, Hume 31.

² Hume, 29th May 1852, 14 D. 821.

³ Black, 22d Jan. 1830, 8 Sh. 367.

⁴ Robertson, Nov. 1687, M. 2184.

⁵ Laidlaw, 25th Jan. 1833, 16 Sh. 367;

affirmed 26th Oct. 1841, 2 Robinson's App. 490.

⁶ Act of Sederunt, 24th Dec. 1838.

⁷ Syme & Stewart, 7th Dec. 1824, 3 Sh.

372.

Crown debtor, all right to the fund competent to the Crown debtor, so far as necessary to satisfy the Crown debt. In all other cases, the arrestment merely creates an inchoate attachment in favour of the arrester over the fund, with a preference over all others subsequently attaching it, provided the arrestment be duly and timeously followed up.

The fund is, in technical language, rendered litigious, that is, the subject of legal discussion ; and the arrestee is liable in second payment, if, in the face of the arrestment, he pays to the common debtor. After the arrestee's death, his heir, if he knows of the arrestment, is bound by it ; but not if he is in ignorance of it. The *nexus*, however, created by the diligence still subsists, to this effect, that, though the arrestee be dead, the creditor will be preferred, in virtue of his arrestment, to one who arrests in the hands of the arrestee's representative.¹ The arrestment subsists, likewise, after the decease of the common debtor. But, being only inchoate, a title as executor-creditor of the deceased will create a preference, except in questions with the Crown, if it is completed before the arrestment is followed out by furthcoming, or an equivalent.² The preference of arresters other than the Crown, *inter se*, is regulated by the date of the arrestments respectively ; and so nicely is that the case, that an arrestment served between six and seven o'clock was preferred to one served between seven and eight of the same evening.³ But where one was served between five and six, and another between five and seven, the same messenger having acted in both cases, the Court held that there was no evidence of priority, and preferred the arresters *pari passu*.⁴

PREFERENCE OF
ARRESTMENTS.

Arrestment is preferable to assignation, though prior in date to the diligence, if not intimated until after ; as, on the other hand, assignation intimated ranks before a subsequent arrestment. When the arrestment and intimation of assignation are of the same date, without an hour being specified, they are ranked *pari passu*, because there are no elements for determining priority.

MULTIPLE-
POINDING AND
FURTHCOMING.

In order to complete the diligence begun by the arrestment,—except where the arrestment is at the instance of the Crown, in which case the property arrested is at once transferred to the Crown,—the arrester can raise either a process of multiplepoinding or of furthcoming, whether there are several arresters or not. In the former (that of raising a process of multiplepoinding), he will lodge a claim to the fund, and, if preferred by the Court, will get decree, ordaining the holder to pay or transfer to him. In the latter (that of raising a process of furthcoming), he will conclude for payment, or transfer, of the fund to him, in virtue of his debt and arrestment. In both, he must produce the grounds of debt and the arrestment ;—and in both, objections to the debt or diligence

¹ Earl of Aberdeen, 22d Dec. 1738, M. 774.

² Carmichael, 22d June 1742, M. 2791 ; Wilson & M'Lellan, 26th June 1823, 2 Sh. 430.

³ Cameron, 28th February 1772, M. 821.

⁴ Wright, 28th January 1774, M. 823.

will be stated by the common debtor, who is a party to the actions, or by competing creditors, in the case of the multiplepoinding. The arrestee, also, may state all objections competent against the validity of the diligence; but he is not entitled to raise questions regarding the validity of the arrester's debt, assuming it to be *prima facie* constituted. It is all the same to him whether he pays to one party or another, provided that he pays only once for all; and the common debtor is the party to state such objections in a process of furthcoming.¹

Where the arrestments are used on a depending action, they cover the expense of such action, though decerned for in favour of the agent who conducts the action, and not in favour of the arrester himself.²

After decree of preference in a multiplepoinding or decree of furthcoming is obtained, the arrested fund, if it consists of a bond, will be transferred to the arresting creditor; if of money, will be paid over to him; and if of goods, a public sale will be ordained, and the price ordered to be paid to the creditor. In any case, the decree of preference, or of furthcoming, constitutes perfect diligence, and a completed right in the person of the arrester.³ Decree of furthcoming, however, has no effect in making the arrestment effectual, if the debtor is made notour bankrupt within sixty days of the arrestment.⁴

The question here occurs, in what mode are arrestments, which have once been used, withdrawn or removed? This can be done by simple letter from the arrester, which ought to be probative; and when the letter was so, though it had been given under false impressions, the arrestment was still held to be effectually withdrawn.⁵ The arrestments may also be removed by letters of loosing arrestments, either absolutely or upon caution;⁶ or the arrestment may be recalled by the Court of Session, on cause shown in a petition for recal.

Arrestments for sums not exceeding £8, 6s. 8d. prescribe within three months from their date, unless renewed, or followed by action of furthcoming, or of multiplepoinding.⁷ In other cases, arrestments prescribe in three years.⁸ The period formerly was five years.⁹ The years are reckoned, in the case of contingent debts (that is, where the arrester's claim is subject to any contingency), from the date as at which the arrester's claim becomes absolute, and the contingency is purified. And delay in following up an arrestment by furthcoming may raise the question whether the diligence has not been relinquished; delay of three years was held not to imply relinquishment; but delay is always hazardous.¹⁰

¹ Houston, 20th July 1849, 11 D. 1490.

² May, 7th June 1825, 4 Sh. 76.

³ Muirhead, 17th Feb. 1735, M. 687.

⁴ Dobbie & Co., 30th May 1854, 16 D. 881.

⁵ Ewing, 9th Dec. 1813, F. C.

⁶ See the Juridical Styles, iii. 556, and Personal Diligence Act, s. 21.

⁷ 7 Will. IV. & 1 Vict. 41, s. 6.

⁸ Personal Diligence Act, s. 22.

⁹ 1669, c. 9.

¹⁰ Lister, 25th July 1787, M. 824.

BRANCH III.

DEEDS RELATING TO HERITABLE RIGHTS.

TITLE I.

THE CONSTITUTION OF AN ORIGINAL FEUDAL ESTATE.

CHAPTER I.

PREPARATORY
SKETCH.

IN endeavouring to explain the system of permanent Land-Rights in Scotland, it is not my intention to enter at large on the consideration of the origin or history of the Feudal Law and usages. A dissertation of that extensive character is not required, in order to the exposition of the principles of the system. A brief notice, however, of the position of the national land-rights, and the relations of superior and vassal in this country, more particularly in the early feudal ages, is clearly requisite, both for understanding the essential principles of the system, no one of which has undergone alteration, and for appreciating those modifications in point of detail which have been made on it from time to time, and from which, taken together, it has its distinctive characteristics of security and simplicity.

ESTABLISH-
MENT OF
FEUDAL SYSTEM.

It is agreed on all hands, that the Feudal System was established in the south and west of Europe by the hordes from the north and from Asia, which overran and subverted the Roman Empire and most of its dependencies. Whether it was formed in England during the existence of the Saxon power, or was brought from the Continent by William the Conqueror, is a point on which learned writers are not at one. Professor Menzies says that, after the Norman invasion, the whole land in England was converted into proper feus;¹ and certainly the system was well suited to promote the views of a Sovereign who owed his title to the sword. At what time the system obtained footing in Scotland is also matter of controversy. Lord Kames² and others hold it to have been first adopted among us under Malcolm Canmore,—a wise and politic prince,—and to have made its way throughout this country gradually. From its remarkable peculiarities, and the obvious fact that, although

¹ Menzies, p. 510.

² Kames' British Antiquities, Essay I.

adapted to the genius of this country in earlier ages, it was incorporated a fundamental change in the system of land-rights, it appears probable that, with us, it was the work of time and circumstances rather than the result of any direct exercise of power. The system, by whatever means incorporated among our institutions, struck root at a very early period in our history, and pervaded the kingdom.

The original and fundamental principle of the system was, that all the lands in the kingdom either belonged to the Sovereign, or were held by the respective owners as vassals of and under the Sovereign, on condition of military service, or knight's service, as times called. The Sovereign himself could not, in the nature of things, have any superior. His own right, *jure coronæ*, was allodial, free of all obligation and condition. He was the source or fountain from which all feudal rights flowed. From time to time the Sovereign granted lands to subjects, on condition of their performing military service for the Sovereign, when required by him. The grant, and its acceptance, constituted a mutual contract: the Crown gave the lands; the vassal was bound, in respect thereof, to serve the Crown in time of war or in defence. Or it may be described as a conditional grant; the condition being that the vassal should so serve, and should hold the lands only whilst fulfilling the condition. In like manner, subjects, holding in virtue of grants from the Sovereign, gave out subordinate rights to others, establishing with them the relative position of superiors and vassals. The vassals here again gave out, or were entitled to give out, subordinate rights, and so on downwards, each new subordinate grant constituting a new relation of superior and vassal. The superior and vassal, in every gradation, were in the same relative position to each other as that of the Sovereign and his immediate vassal.

The stipulation or condition on which every grant was made, and held, was military service; and so much was this the case that, if a grant was silent as to the manner or condition of the holding, it was presumed to be for such service. The grants, however, did not denude the makers, or dis sever their connexion with the lands. On the contrary, each superior, the Sovereign excepted, remained in his order, notwithstanding his having made the subordinate grant, vassal to his own immediate superior, and liable as such to perform military service. Each vassal was superior to his own immediate vassal, and entitled, as such, to exact the same service.

The lands, viewed as a whole, formed, as it were, the subject of a joint-ownership; not as that term is now generally understood, but still essentially a joint-ownership, though of a very peculiar character. The change, which the position of the maker of each grant underwent, arose mainly and practically with reference to the right to possess the lands and draw the fruits or rents, and the obligation or liability for payment of the national and local charges, or, in modern phrase, the public and

FUNDAMENTAL
PRINCIPLE OF
THE SYSTEM.

MILITARY
SERVICE.

RIGHTS OF
SUPERIOR AND
VASSAL.

parish burdens thereon. Each vassal, before making a subordinate grant, was proprietor and possessor. He had the whole proprietary benefit, an estate or interest which lawyers came to designate as the *dominium utile* of the soil. He was liable to pay all the burdens attaching by law to the rights of property and possession. By making the grant, he ceased to be proprietor in the sense of possessor; though, as we shall see, he had incidental rights, entitling him to resume the lands for a time, or permanently; and, even without resumption, he had an important control over the vassal's transactions as affecting the property. But, in general, he gave to his vassal that right of property which carried with it the privilege of possession, and of drawing the fruits and rents, so long as such vassal fulfilled the condition of the grant; the vassal, when the contrary was not stipulated, being liable to relieve the superior of the public and parish burdens. But the superior retained the radical right, the estate or interest which we now know familiarly as the *dominium directum*, or right of superiority, as contradistinguished from the *dominium utile*, or right of property conveyed to his vassal. Usually the entire right of property went to the vassal undivided, and the vassal became liable to pay all the corresponding burdens. But, on the one hand, the superior might reserve to himself valuable subjects, such as coal and lime, along with the *dominium directum*; and, on the other hand, it might be part of the contract that certain burdens, usually falling on the *dominium utile*, should attach to the *dominium directum*, or *vice versa*. In other words, the estate, as it stood undivided before the subordinate grant, became a joint-estate after such grant. Each party had real rights, and was subject to liabilities, distinct and separate, but capable of enlargement or restriction according to agreement. The rights of the parties accordingly stood thus:—The radical right was in the superior, who was entitled, through his vassal, to have the condition of the subordinate grant fulfilled. He was therefore entitled, at all times, to have a vassal; and, if his vassal was not capable of fulfilling such condition, the superior was entitled to obtain compensation in one of those contingent or incidental rights attached to the *dominium directum*, technically called the casualties of superiority. The vassal, on the other hand, possessed the lands on condition of performing military service to the superior. As long as the superior had a vassal who was capable of fulfilling, and did fulfil, the condition of the grant, the superior could require nothing more. But in case of the non-fulfilment of the condition, or in case of the failure of the vassal, and until the admission or entry of a new vassal capable of fulfilling the conditions, as well as in some cases of feudal delinquencies on the part of the vassal, the superior was entitled, in virtue of his radical and fundamental right, to be reinstated in the actual possession of the lands, temporarily, or, in some cases, permanently. He had made a grant, the condition of which was not fulfilled; and the law in consequence suspended the grant for a time, or annulled it permanently. The grant to the vassal, and nothing else,

excluded the superior ; and, the grant being suspended or annulled, the superior's title resumed its original place, temporarily or permanently. During the suspension, or after the annulling of the grant to the vassal, there was no title but that of the superior himself, and he re-entered and possessed the lands accordingly.

The incidental rights arising to the superior, contingently on the vassal's death, or inability or failure to fulfil the conditions of the grant, were technically called, as has just been stated, the casualties of superiority. Those appropriate only to the military holding are all now abolished, along with that manner of holding itself. But they are highly illustrative of the principles of the system of feudal land-rights ; on which account, and as they are the origin of the incidental rights or casualties still attached to estates of superiority, it will be useful here to explain their nature shortly.

1. The most important was the casualty of ward ; arising when the vassal's estate or feu fell to an heir who happened at the time to be in minority. The superior was, from a very early period, bound to admit or enter the heir as his vassal, in place and stead of the deceased ancestor. But, the condition of the grant being military service, which, it was said, could not be performed by a minor, the feudal law gave the superior, during the heir's minority, not only the custody or guardianship—the warding—of the heir's person, and management of his whole affairs as his tutor ; but also, in compensation for the loss of services, the full rents of the heir's estate. Hence the casualty was called the ward, and the tenure by military service acquired the name whereby it is now most familiarly known, viz., ward-holding. The superior's rights, in virtue of this casualty, lasted until the heir, being a male, attained twenty-one years of age, or a female, fourteen, until which age, by our old law, she could not marry. The guardianship of the person appears to have been little exercised, however, after the commencement of the seventeenth century. Erskine says superiors grew weary of an office which brought no profit ;¹ and hence the casualty of ward came latterly to be understood with reference to the superior's right in his minor vassal's estate. By-and-bye this casualty came occasionally to be fixed at a specific sum, payable annually during the wardship,—in other words, taxed. In such cases, the superior levied from the minor vassal the taxed sum annually. The vassal, on the other hand, had the uninterrupted right of possession of his own lands. The casualty of ward, whether simple or taxed, was abolished altogether in 1748.² But, under the holding in simple ward, and whilst the casualty was in operation, the right of the superior was so independent, that no debt contracted, or right granted, by the previous vassal, without either direct legal authority or the superior's consent, had the effect of restricting the ward-estate to the superior's prejudice. The superior was not bound to respect subordinate rights granted by his vassal, though duly published and made real through the registers ; nor

CASUALTIES OF
SUPERIORITY.

WARD.

TAXED WARD.

¹ Erskine, ii. 4. 3.² 20 Geo. II. c. 50, s. 1.

leases so granted, though followed by possession of the tenant, and protected against purchasers by an express Statute.¹ That Act did not extend to or affect the rights of the superior, which remained untouched by such leases. The vassal's debts, though heritably secured on the ward-lands, were not effectual against the superior, who could also disregard servitudes constituted by the vassal, unless fortified by prescription. Even the decree of a Sheriff, fixing the marches of the ward-lands, was not effectual against the superior, if he had not been made a party to the suit. In certain contingencies, the superior's right is as independent even at the present day, though it is hardly ever met with in exercise to the full extent.

MARRIAGE.

2. As connected with the willing and efficient performance of military service, the superior had an interest in seeing his vassal, particularly when a female, married into a friendly house. Hence there was the casualty, peculiar to ward-holding, of marriage; arising from the right claimed by the superior to choose a wife or a husband, as the case might be, for a vassal succeeding as heir of a former vassal, and to receive what the heir got with such wife or husband in name of tocher or provision. This casualty, by our later practice, accrued to the superior in every case where the vassal-heir was not married at the time of his ancestor's death. It was exigible even though the heir, when required by the superior to marry a lady of the superior's choice, accepted and married such lady. The amount, called the avail (or value), was ultimately estimated at two years' rent of the ward-vassal's whole lands; not merely the lands held of the superior claiming the casualty, but the whole lands belonging to the vassal. When, however, the vassal, not contented with refusing the wife or husband offered by the superior, presumed to choose a wife or husband for him or her self without the superior's consent, and intermarried with the person so chosen, the vassal was liable in double avail. A curious evidence of the abuses attempted under this state of the law appears from a reported case, where the superior, having learnt that his vassal was actually engaged to be married, offered him another lady as his wife, in order to found the claim of double avail. This, however, the Court, in the circumstances, disallowed.² And the steps necessary for entitling the superior to claim the double avail instructively tell of the liability of such a right to lead to abuse, and of the checks early provided by legal forms in the way of prevention. The superior had to require the vassal, under form of instrument, to meet and treat with him, in some unsuspected place, upon the marriage offered by the superior. If the vassal, at the interview, refused to name a day for celebrating the marriage so offered, the superior took upon himself to name the day for such marriage, and, upon the day appointed, brought the lady to church, where she must have openly declared her willingness to accept of the vassal for her husband. On this Erskine remarks: 'As it can hardly

¹ 1449, c. 18.

² Drummond, 22d Feb. 1678, M. 8541.

'in favour of a man who had declined making addresses to her, it cannot be matter of wonder that no instance occurred, since the institution of the College of Justice, in which the double avail of marriage was adjudged against an heir.'¹ I need hardly say that we have no remains of this casualty now. It was abolished along with the casualty of ward in 1748.² The latest instance I have met with of the exercise of the right, as above described by Erskine, occurred in 1614. In that case the superior was a nobleman, offering his own daughter. The vassal likewise was a nobleman.

3. There was the casualty of recognition, which was a total forfeiture of the feu to the superior, in case of the vassal alienating more than the half to a stranger without the superior's consent. This was introduced in order that, if the vassal should, by parting with the better portion of the land, disable himself from rightly performing feudal services, the superior might have it in his power, by means of the possession of the lands, to provide another vassal capable of performing those services. When this casualty took place, it operated the forfeiture of the whole feu,—as well the part alienated as the remainder. The casualty arose whether the ward was taxed or not; and it regarded all as strangers to the feu except the eldest son, or the person who, if he had survived the vassal, would have succeeded him as his heir, by the operation of law or destination of the feu. Recognition was thus inferred through alienation by a father to his second son, or by a wife to her husband. Recognition was abolished along with ward-holding, and it is no longer known in the system of our land-rights. But, in the vassal's disability to alienate to a stranger without the superior's consent, we can see the origin of what is now the most valuable of the existing rights incident to superiors,—I mean the fine, or entry-money, called composition, payable by a stranger, or singular successor, on his being received or entered as vassal in a feu.

Such, generally, appears to have been the footing on which feudal rights were at first constituted in Scotland. A very cursory glance into our early national history will show how well the system, as a species of military organization, was adapted to the condition of the country, particularly with reference to defence against foreign aggression or inroad, and also in connexion with intestine commotions and private feuds, and will account for the rapid adoption of the system throughout the kingdom. Lands, however, must have been largely out of the hands of the Crown, and in possession of subjects, before the introduction of the new system; and, as it is certain that the feudal system came to pervade substantially the whole kingdom, the question naturally arises,—how were the land rights, existing prior to the introduction of the feudal system, made subject to the feudal relations? These rights were allodial, requiring no grant or other title from a superior, and liable to no restraints on alienation, and no obligations of any kind to third parties. The

METHOD IN
WHICH FEUDAL
SUPPLANTED AL-
LODIAL RIGHTS
IN SCOTLAND.

¹ Erskine, ii. 5. 21.

² 20 Geo. II. c. 50, s. 1.

substitution of the feudal title, in these cases, is thought to have arisen largely through the extensive forfeitures which were the result of the turbulent state of the times. The forfeited territory fell to the Crown, and, on being again given out by the Crown, was granted to the old or to new vassals, to be held by them on condition of military service. The same turbulent times rendered it, on the one hand, important for the great proprietors to increase the number of their dependants or followers, and strengthen their party; and, on the other hand, made it matter of necessity for the smaller proprietors to place themselves under the protection of some one or other of the powerful chiefs. Both of these objects would be attained by the smaller proprietors giving up their lands to the larger, and accepting from them new grants, whereby the relations of superior and vassal, with the obligation of service to the superior, and the privilege of protection to the vassal, were formally constituted. Of the fact, that the system was almost universally adopted, there can be no doubt; and the above theory, suggested by the ingenious Lord Kames,¹ appears sufficient to account for it.

**DISTINCTIVE
FEATURES OF
THE FEUDAL
SYSTEM IN
SCOTLAND.**

The system now in operation among us has distinctive and peculiar features, similar to those of the older system. The Sovereign, whose own right is necessarily allodial and holden of no superior, is the original source or fountain of all feudal rights. The Sovereign has, in fact, according to feudal principles, a legal estate of property in the whole lands in the kingdom, except as regards the allodial lands of Orkney and Shetland. Original grants of land are now made on principles fundamentally the same as of old. The parties who have obtained grants from the Sovereign are, respectively, in questions with the Crown, proprietors to the extent of their grants; and the right of the Crown, as proprietor, is limited according to the tenor of these grants. The holders thereof—that is, the Crown vassals—are, on the one hand, entitled to possess all that is contained in the grants. On the other hand, they are bound to fulfil the conditions of the grants—that is, the obligations imposed on them by the terms of the grants; being payment of money, or it may be of some elusory duty if required. The case of each successive gradation of subordinate grants is similar. The granters or superiors, and grantees or vassals, respectively hold,—the former (the superiors), a real right in the lands—a legal estate of property,—entitling them to have a vassal, and to require from him the fulfilment of the conditions of the grants which they have made; and whilst there is a vassal, and he fulfils these conditions, the superiors can ask no more;—the latter (the vassals) have a real right in the lands—an actual estate of property,—subject to the fulfilment of the conditions imposed by the grants; and, as long as they satisfy these conditions, they are entitled to hold and possess, and cannot be disturbed by the superiors. But, if the vassals fail to fulfil the conditions, the grants may be resumed, temporarily or permanently, according to circumstances. In

¹ Kames' *British Antiquities*, Essay i.

that case, the rights given are liable to forfeiture; whereupon the grants will revert to the superiors, in the condition in which they were originally given out, and free of all subordinate grants by the vassals, none of which are available against the superiors after the vassals' forfeiture. The lands thus forfeited remain with the superiors, in some cases, till the vassals fulfil what was incumbent on them; in others, permanently. The operation of this right of resumption illustrates the real nature of the right reserved or remaining in the superiors, notwithstanding the grants they have made. So long as the grants continue in force, the superiors are excluded by their own act from all but the fulfilment of the conditions thereby stipulated. But the radical right is still with them; and if, through the vassals' failure to perform their part, the grants be forfeited, the superiors are no longer bound to remain excluded. They are, thereupon, entitled, after adopting certain judicial proceedings, to resume; but they do not re-acquire—they resume the possession of the lands, with all their fruits. They resume, moreover, without establishing any new title in their persons. They do so in virtue of their own original fundamental title. That title, originally, contained the lands, whole and entire. After the subordinate grants were made, the superiors' title still contained the lands; subject, however, to the rights given to the vassals, in consideration of the conditions which they had undertaken to fulfil. But, the right of the vassals being (in the case supposed) suppressed for a time, or extinguished, the superiors' original title is revived; and its extent is the same—temporarily or permanently—as before any subordinate grant was made. On the other hand, there are obligations incident to property, which, when occurring between parties not in the relation of superior and vassal to each other, are merely personal, even though forming the subject of express regulation or stipulation; but which, when expressly made part of the feu-contract between superior and vassal, are real, and parts of, or burdens on, their estates respectively. I will by-and-bye notice cases in which this result occurs.

The system, however, though in its principles the same now as of old, has undergone great modifications in detail; having been forced to adapt itself to the growing wants and intelligence of the country at large. It has been thought by Sir Thomas Craig¹ and others, that originally feus were not granted even for the vassal's lifetime, but were liable to be resumed by the superior at his pleasure. Sir Thomas calls this period the infancy of feus. Professor Menzies notices that Mr. Hallam and M. Guizot have suggested some doubt of the accuracy of this view.² It appears to be agreed, however, that as feudal grants were obtained, not by purchase, but as *munera*, and in consideration of certain personal qualities in the grantee, the fee or property did not at first descend to his heirs. Upon his death, it reverted to the granter, who might again give it out to a new holder for his life; which stage Craig calls the childhood of feus,—a period which extended from the beginning

GRADUAL
DEVELOPMENT
OF THE SYSTEM.

¹ Craig, i. 4. 4.

² Menzies, p. 509.

of the seventh to the end of the eighth century. Their manhood (in the nomenclature of Craig) was reached, when the proprietors obtained permanent rights devolving upon their heirs. It is the opinion of Craig, that the system had not attained its state of manhood when it first came into this country.¹ But it must have done so very soon thereafter; and important innovations were speedily made on it.

**TENURE OF
FEU-FARM.**

The first object of these changes was the improvement of agriculture, with a view to which in this country, as in the other countries of Europe, there was largely substituted for military service, or ward-holding, the tenure of soccage, or the payment of agricultural services by the vassal to the superior. These services again were, in course of time, exchanged for payments of corn and cattle; and finally, for the mutual convenience of superior and vassal, both services and payments in kind came, in many cases, to be commuted for a fixed rent in money—in other words, a feu-duty. In this way arose the tenure, now most commonly met with in Scotland, viz., feu-farm.

BLENCH-FARM.

By-and-bye, lands were also given off, exclusively, for a price paid at the time; and a nominal payment annually thereafter—such as a penny Scots, a pepper-corn, a pair of spurs, or of gloves, etc., if asked only—was inserted merely as an acknowledgment of the superiority. This was called the tenure of blench-farm.

FREE BURGAGE.

In the meantime, and at an early period, the gradual growth of trade and commerce, and the progress of the arts and manufactures, led to the establishment of burghs, an important social and political element in our national history. Security being a *sine quâ non* of industrial wealth, the persons engaged in commercial pursuits, and their dependants, associated themselves in towns and communities, which were encouraged by our most prudent Sovereigns; both as a source of direct strength and wealth to the kingdom, and as a counterpoise to the overweening nobles. Important privileges were granted to the burghs, and territories were conferred on them, which they were to hold directly of the Crown. Hence arose the tenure of 'free burgage,' by which lands or houses, included in the territories of royal burghs, are held of the Crown for performance of the service of watching or guarding. This is plainly a species of ward-holding; and its adoption was most natural in the circumstances; as we know that in early times the associated burgesses frequently had to perform service of a military nature, for defence against assaults from without, and commotions within. This tenure, however, imposed no restraint on the vassal's power of alienation, and had none of those casual rights which have been noticed as incident to proper ward-holding. Some interesting observations on the constitution of the burghs, and, indeed, much valuable information on the subject of the feudal system generally, and the causes which made it gradually yield to the progress of agriculture and of commercial intercourse, will be found in Bell's Commentaries.²

¹ Craig, i. 10. 7, and ii. 3. 28.

² Bell's Comm. i. 20, *et seq.*

Lastly, another species of tenure arose in connexion with the Church, TENURE OF MORTMAIN. which, prior to the Reformation, possessed very extensive estates in land, accumulated from the gifts of many generations. The extent of these, Mr. Bell says, was reckoned at nearly one-half of the territory of Scotland. The late Principal Lee, perhaps even a higher authority on that subject, confirms this statement. He says, 'In Scotland, the ecclesiastical property was nearly equal to one-half of the kingdom; the temporality having been little less than a fourth, and the spirituality, including the tithes, more than a fourth of the whole rent. The dignified clergy were assessed to the extent of one-half of the public contributions for the service of the Government.'¹ At another place, the learned Principal speaks of the wealth derived from Church lands and teinds as having amounted to much more than a third of the rental of Scotland.² The lands held by the Church were given *ad manum mortuam*, or mortified, with a view to the performance of religious services; and the condition of the holding was the offering up of *preces et lacrymæ*. This was called the tenure of *Franc-al-moigne*, or Mortmain, which, Erskine quaintly says, approached nearer to blench-holding than to ward.³ It was abolished at the Reformation.

In tracing the modifications on the system of land-rights, by which it has gradually become adapted to the requirements of modern times, SUPERIOR'S CONSENT TO ENTRY OF PURCHASER. we have also to notice the abrogation of the right which superiors formerly had,—though perhaps not from the earliest times in the case of land being sold judicially for payment of the vassal's debts,—to refuse their consent to the substitution of new vassals in place of the old, by alienations either absolutely in the way of sale, or redeemably in the way of security for debt. Under the burgage-holding, the Crown was the superior, and the Crown never objected to receive a new proprietor in burgage lands as vassal instead of the old. But with the Crown, as to lands not so held, and likewise with all other superiors, the case was different. No vassal was entitled, without his superior's consent, to alienate his feu, either redeemably or irredeemably, so as to substitute a stranger as vassal in his place; and in the law of land-rights all were, and all still are, considered strangers to the feu, except the heir of the investiture, flowing from, or confirmed by, the superior, and existing for the time. The right or privilege of the superior on this point appears to have had its origin in the *delectus personæ*, existing when feus were held on condition of military service. But what was originally incident to that manner of holding was made a part of the general system of land-rights, when held by feudal, and not by burgage, tenure, and was extended both to blench and feu holdings; so that, in early times, it was not in the power of any vassal, as matter of right, to require his superior to admit or enter a new vassal in his stead, in any portion of his feu. We find, indeed, that by an Act of Alexander the First, when the

¹ History of the Church of Scotland, i. p. 41.

² Hist. of Church of Scot. i. 43, 44. Note.

³ Erskine, ii. 4. 10.

moveables of a debtor having lands were insufficient to pay his debts, the Sheriff was to sell his lands on fifteen days' notice; the purchaser to hold of the Crown, or subject-superior, as the debtor held; the subject-superior having always right of pre-emption.¹ It appears also that, even at a remote period, and before the modifications of the law on the subject now in force were introduced, superiors consented to accept and enter strangers to the feus, or, as they are now called, singular successors, instead of the former vassals, on payment of fines of various amount. But, at the period here referred to, the right of superiors to refuse new vassals was absolute.

SUPERIORS
ORDAINED TO
RECEIVE
APPRISERS.

That, however, was a state of things which, to a people growing in wealth and intelligence, was intolerable. It was obviously essential that land should become an article of commerce, and still more that it should be made subject to the onerous debts contracted by the proprietor, which, in a very early age, it seems to have been,—though, for a time afterwards, it was not. But the manner in which our legislators proceeded, in amending the law on these important points, shows remarkable caution, and is highly illustrative of the deep-rooted influence which the feudal rules must have obtained in the country. The Act of Alexander is the earliest Statute we have on this subject. But that Act seems to have fallen into abeyance; for, in 1469, an Act² was passed, conferring on creditors, as a new and original privilege, the right to apprise their debtor's lands for payment of his debts. This last-mentioned Act has proved of very great value and importance in regard to Scottish land-rights. For, although in its terms in favour of creditors only, and not professing to improve or alter the position of purchasers, it has in its practical operation been available to absolute purchasers also. In fact, it not only formed the introduction to the laws by which heritable estate in Scotland can be sold by the owner's creditors, for payment of the owner's debts, but it has proved the foundation of the arrangement, now by law existing, in reference to the admission or entry of strangers or singular successors to feudal estates. By its terms, it simply conferred power on creditors to obtain judicial securities over their debtors' lands,—that is, to apprise the lands for payment of their debts; the rights of the creditors being redeemable by the debtors (the owners of the land) within seven years. In the case of apprising, it abrogated the superior's right to refuse the new proprietor, and ordained the overlord, or superior, to receive the creditor as his tenant,—that is, vassal (strictly speaking, the person holding the feu),—on payment of a year's mail, or rent, as the land was set for the time. The Act thus entitled creditors-apprisers to compel the superior to receive them as vassals on making this payment; and ordinary purchasers were in use to go through the form of apprising the lands purchased, after which they took advantage of the enactment to obtain entries in the form and character of creditors-apprisers, paying, of course, the year's rent due to the superior. By-and-

¹ Thomson's Acts of Parliament, i. p. 371.

² 1469, c. 3.

bye, appraisings, as conducted under the Act in question, were found to cause injustice and oppression to the proprietors of lands; and adjudications,—that is, judicial dispositions or conveyances in favour of the creditors, but subject to the right of redemption on the part of the debtor during a limited period,—came to be substituted for appraisings. And by the Act 1672, cap. 19, adjudgers were placed on the same footing with appraisers as regarded the superior. A few years afterwards, we find purchasers of bankrupts' lands at judicial sales entitled to be entered on payment of a year's rent.¹

Still, ordinary voluntary purchasers were denied the privilege of being at once, and as matter of legal right, admitted in their true character of purchasers as vassals, instead of the former vassals. This state of the law led to the introduction of conveyances with alternative manners of holding,—*a me de superiore meo*, and *de me*; the operation of which I will explain fully in a subsequent lecture. The effect was to give a purchaser present security of title, against all third parties not having rights preferable to the seller's own right, and full power to obtain an entry from the superior, as soon as the superior consented to receive him as vassal. From these two modes of obviating the legal difficulty interposed by the feudal rules,—aided largely, no doubt, by the offer of the usual fine or composition upon entry,—it became usual for superiors to compound with new proprietors, and to accept from them a year's rent, in consideration of waiving the right to refuse them an entry. But the new proprietors remained without direct legal remedy (in the event of the superior refusing an entry) until after the Rebellion in the year 1745; when, by the Act 20 Geo. II. cap. 50, sects. 12 & 13, superiors were ordained to enter purchasers or disponees, upon their paying or tendering such fees or casualties as the superior was by law entitled to receive upon their entry. The Act of 1747 was passed at a time when the suppression of a rebellion, fostered almost exclusively by a party whose influence lay in their feudal power, must have greatly strengthened the hands of the Government. Nevertheless, we have still, in that Act, a remarkable concession to feudal notions, in the particular mode by which alone it enabled new proprietors to enforce their right of being admitted as vassals to their feus. For a long time previously, it had been usual to frame conveyances of land, with a view to the purchaser's entry with his superior, in one or other of two forms, viz., by resignation or confirmation. According to the former, the vassal selling appeared before the superior, and, with all reverence and humility, as the Styles record (and in this they no doubt tell of what took place in early times, though the practice gradually fell into disuse), resigned, and surrendered his feu into the hands of the superior in favour of his—the vassal's—disponnee, in order that the superior might receive and enter and infeft such disponee as his vassal. This was the entry by resignation, in which you will observe that the new vassal's infeftment

ENTRY OF
PURCHASERS ON
PAYMENT OF A
COMPOSITION.

¹ 1681, c. 17.

proceeded directly from the superior. In the entry by confirmation, the old vassal first gave the new vassal an infeftment, which the superior was then asked to confirm. But there was no resignation and surrender, and the new grant, or infeftment, did not proceed from the superior. He simply confirmed the grant made by his old vassal. The practice of framing conveyances, adapted to either of these modes of entry, had become universal, long before the passing of the Act of 1747; and it would have seemed natural that the new law should have authorized entry in either form, in the option of the vassal. But the law did not go so far. It allowed only one form in which to require the superior to grant entries; and it selected that which had the most distinct traces of feudal usages in it, viz., the resignation and surrender by the old vassal in the hands of the superior, in order that he might give the new infeftment to the new vassal. After various modifications of the law in the above particular, the last vestige of restraint was removed in 1847 by one of Lord Rutherford's Conveyancing Acts;¹ and superiors are now bound to admit and enter any person, having a formal title from the last vassal, upon payment of such fees or casualties as they are by law entitled to receive.

HOSTING AND HUNTING.

It had been not unusual to engraft on feu-holdings obligations to pay marriage-fines, and obligations of personal service, similar to those implied in proper ward-holding; the object of superiors being to secure thereby the benefits of the feu-holding, without losing those attendant on the ward. These were called the services of hosting and hunting, being obligations to attend the superior in time of the king's wars, and of trouble and insurrection in the country; to ride or go with him (as the Style set forth) in help and defence of himself and his friends, their honour, life, lands, goods, and gear, and to appear with him in good equipage on local State occasions; in other words, in wars and commotions, and at frays and followings. All these obligations were abolished by the Act commonly called the Clan Act, which was passed after the Rebellion of 1715,² and the Acts which were passed after the Rebellion of 1745.³ Annual payments in money were substituted in place of these obligations; the amount to be assessed by the Court of Session, when the parties themselves could not agree on it.

HERITABLE JURISDICTIONS.

It may not be out of place to notice here the heritable jurisdictions which formerly existed throughout Scotland; for though they no longer exist, and their abolition was of importance politically and socially, far more than as connected with the system of land-rights, still they were strictly incidental and appropriate to the feudal usages, which regarded the superior as the judge, as well as the ruler, in his own territory. The jurisdictions, moreover, were feudal estates granted by the Sovereign, to be held of and under the Crown as superior, and for payment of annual duties. They were alienable by one vassal to another, as far as lands were so alien-

¹ 10 & 11 Vict. c. 48, s. 6.

² 1 Geo. I. stat. 2, c. 54.

³ 20 Geo. II. c. 43, and c. 50.

able, and they could be attached for the proprietor's debts equally with lands. The most numerous of these jurisdictions were those attached to feudal baronies. The erection of a barony in old times carried with it the power of inflicting capital punishment on those within the barony, for offences there committed. In Crown charters of baronies, granted within a comparatively recent period, the clause expressing the privilege of 'pit and gallows,' 'infang-thief,' and 'outfang-thief,' appears to have been introduced almost as matter of course. The most important of the jurisdictions, however, consisted of sheriffships of counties, or portions of counties, of which there were no fewer than twenty, and lordships of regalities, of which there were many more. Of these last the proprietors were styled lords of regality. They had, within the bounds of their grant from the Crown, civil jurisdiction equal to that of the Sheriff, and criminal jurisdiction more extensive;—as they were, occasionally at least, competent to judge in the four pleas of the Crown, and possessed the same jurisdiction with the Court of Justiciary, except in the case of treason. The particular nature of the jurisdiction of the lords of regalities is forcibly exhibited in the following passage, taken from a charter by King James the Seventh to George Mackenzie, Viscount Tarbat. The charter gives him a heritable jurisdiction of regality, with power 'to administer justice within the said regality, and whole bounds thereof, to all persons complaining and having interest; malefactors and transgressors of laws to apprehend, examine, prosecute, and incarcerate, and to bring them to the knowledge of an assize, for crimes of whatsoever nature or quality competent to be judged by His Majesty's laws of the ancient kingdom of Scotland; and that by hanging up, beheading, whipping, dipping or drowning in water, dismemberment, fining, imprisonment, banishment, or extermination out of the said regality.' The above is quoted from Dallas' Styles. These formidable powers were granted to a subject and his heirs, with the ordinary right of alienation; yet so little did such a grant create surprise in his day, that Dallas, as a stylist, merely prefaces this print with a statement that the charter contains the power of Courts, and to a great extent in punishing, 'with many more fit clauses.'¹ The exercise of the powers attached to these jurisdictions in criminal matters had long been discontinued, or fallen greatly into disuse, before the jurisdictions were formally abolished. But it was not quite obsolete; and the Rebellion of 1745 not only showed the necessity of having judicial power placed only in the hands of parties fitted from personal qualifications to exercise the duties of their offices, but it also afforded a good opportunity for making the needful change. The Government of the day wisely took advantage of the occasion. All the heritable jurisdictions were abolished, reserving to the proprietors all lands, etc., which had been annexed to their offices, and providing compensation in money for the abolished jurisdictions. All privileges of pit and gallows, or the like (though the exercise thereof had long fallen into disuse) were

¹ Dallas, p. 577.

formally abolished; and no heritors of lands, erected into a barony, or granted with other lower jurisdictions, or their bailies, were in future to exercise jurisdiction in capital cases, nor in any criminal cause other than minor assaults and smaller crimes; nor in civil causes for debts exceeding 40s. sterling, except for recovering from vassals and tenants the mails and duties of their lands, or multures, or mill services. Proprietors often had the privilege of holding fairs and markets on their lands, with relative rights of jurisdiction; and these rights were reserved, so far as necessary for preserving the peace. There was likewise reserved the jurisdiction, then competent by law, over colliers or salters, but in no case the power of judging in a cause inferring loss of life or dismemberment.¹ The full extent and variety of the jurisdictions thus abolished will be found in the report and certificate made by the Lords of Session to the King in Privy Council, dated 18th March 1748, and printed among the Acts of Sederunt.² The amount of the compensation money to be paid in lieu of the jurisdictions was £152,037, 12s. 2d. sterling.

The important changes in the system of land-rights before detailed, with others of a more practical character, chiefly introduced by the Conveyancing Acts of 1847, 1858, and 1860, have placed the system on a footing substantially adapted to the requirements of the day; and we have this remarkable fact to record concerning these changes, that, though extending over centuries, and the work of numerous hands, and intended to obviate difficulties of much variety, they have not trespassed upon a single essential principle of the system. In principle, the system of land-rights established in Scotland, when the feudal usages were in the zenith of their power, remains wholly untouched. Theoretically and technically, the relation between superior and vassal throughout this country stands at this day in the same position as at the maturity of the system. And, though changes in detail will unquestionably be called for from time to time, we may hope, and, trusting to past experience, we can hardly doubt, that the system will exhibit in itself ample power of adaptation, and will keep pace with every reasonable requirement, consistent with what is the prime object in all systems of land-rights—security of title. In conclusion, it may well be noticed, not without a sense of wonder, and at the same time of gratification, that the system, formerly so well adapted to times of war and internal commotion, should now be so perfectly suited to times of peace and security. It cannot fail to excite wonder that the once powerful organization, the great reality of the feudal system, as a political and social institution, should now exist, with its distinctive principles untouched,—but merely as a technicality; and it cannot fail to excite a lively feeling of gratification that those habits of selfish aggrandisement, and the display of power, on the one hand, and of servile obedience on the other, which the system, in its prime, was so peculiarly calculated to engender and promote, should now, under

¹ 20 Geo. II. c. 43, ss. 1, 2, 6, & 17.

² See Act of Sederunt, 18th March 1748.

our happily constituted Government, and well-regulated state of society, be, even more than the causes from which they arose, matter of history alone.

CHAPTER II.

IN order to constitute an original feudal estate, there must be created a new legal fee, which had previously no separate existence. There is high authority for saying that, in the earliest ages of feudalism, the mode or form, in which the creation of a new estate was accomplished, was this : PROPER INVESTITURE. the proprietor of the lands (who did not become superior until the grant was effectually completed and there was a vassal) went himself to the ground, and there, with his own hands, delivered to the vassal a portion of the lands as for the whole, receiving from the vassal the declaration of fidelity. This was done in presence of the vassals, if there were any, holding other lands of the maker of the new grant as their superior, and who, from being of the same rank, and all bound to attend the Courts of the superior, were termed the *pares curiæ*. This act, so attested, completed the investiture, and constituted the feudal relation between the proprietor (now superior) and his vassal. The evidence of the whole facts remained in the memory of those present. But the possession, which followed on the part of the vassal, necessarily served to prove the extent or particulars of the grant ; and, so long as the condition of every holding was military service, no special proof on that point could be required. The *pares curiæ*, or at least two of them,—or strangers, when there were no existing vassals of the maker of the grant,—required to be present, otherwise the feudal grant was void ; and the *pares*, it is said, had also the power of judging in all questions that might afterwards arise out of the transaction. This simple mode of investiture continued to be followed for a considerable time,—how long, does not exactly appear. But afterwards, for the better authentication of the grant, the proprietor or superior was in use to make a declaration in writing that he had given possession of the lands to his new vassal. This document BREVE TESTATUM. was called the *breve testatum*, being a brief attestation of what had taken place, and was authenticated by the seals of the granter and *pares curiæ*, or other witnesses. The above, being done by the superior *in propria personâ*, was called the proper investiture. Whether with the *breve testatum* or not, it was equivalent to our modern charter with registration, or sasine and registration combined ; being evidence of both the grant and the delivery of possession to the vassal. Nor was the superior's own attestation indispensable ; the certificate of a notary-public, or of two witnesses from among the *pares curiæ*, being also received as evidence.

The *breve testatum*, when used, was thus the evidence of the fact that

IMPROPER
INVESTITURE.

the new vassal had been invested. But in many cases it was inconvenient for the maker of the grant to attend personally and give delivery; for which reason, the practice was introduced of executing the *breve testatum* before possession was given, and directing it to an officer in the superior's service, called his bailie, as a warrant for giving possession to the vassal. The bailie, having complied with the direction, sealed the warrant in evidence of his having done so; or wrote out a separate declaration that he had given possession, which he authenticated with his seal. This declaration is, in substance, equivalent to the modern instrument of sasine, and, along with the warrant, has a resemblance to the charter and sasine, towards which it was a great advance. The investiture by means of the bailie was called the improper investiture, because not conferred by the granter himself *in propria persona*. You will find in Erskine a copy of the declaration by a bailie of his having given possession to a vassal, in virtue of letters of sasine from a superior, directed to him as bailie, constituted by letters of bailiary.¹

CHARTER AND
PRECEPT OF
SASINE.

In course of time, the *breve testatum* was superseded by a formal charter from the proprietor, accompanied by a separate precept, or command to his bailie, to give possession or sasine to the vassal. By-and-bye, the precept was incorporated with the charter. An instance of the charter or disposition, with the precept of sasine incorporated or engrossed in it, as early as the year 1641, is given by Mr. Rodger in his valuable exposition of feudal forms and their history.² More lately, in place of constituting a certain individual by name, as bailie, to give possession or sasine, the precept came to be directed to no one in particular, but to
 , as bailie in that part,—that is, a bailie specially constituted for the single purpose of executing the particular precept, and nothing more. Any man into whose hands the precept might lawfully come was thereby authorized to give the sasine. Thereafter, in virtue of the Sasines Act of 1845, precepts of sasine were directed to any notary-public.³ Now, by the Titles to Land Act of 1858, a precept is not an essential part of a charter or other conveyance of lands.⁴ The writ, of which the progress has just been sketched, is the modern charter.

INSTRUMENT OF
SASINE AND
REGISTRATION.

Whilst precepts of sasine, addressed to bailies, were in use, the grant required to be followed by delivery (that is, symbolical delivery, or sasine) of the lands, given on the ground of the lands; and such delivery required to be attested in an instrument, under the hand of a notary-public and two witnesses. But this was found not enough by itself to protect the lieges against fraud; for which reason, registration of the instrument of sasine for publication was made necessary by Act of Parliament in the year 1617; the necessity for the delivery of sasine remaining as before.⁵ The law continued on this footing until the year 1845; long before which time, it had been felt that registration

¹ Erskine, App. No. III.² Rodger's Feudal Forms, p. 176.³ 8 & 9 Vict. c. 35, ss. 5, 6.⁴ 21 & 22 Vict. c. 76, s. 5.⁵ 1617, c. 16.

was the essential, and that the symbolical delivery was of no value in the way of security of title. Accordingly, by the Sasines Act passed in the year 1845, symbolical delivery was declared unnecessary, and the giving of sasine was made a mere matter of words, without any pretence of reality; the instrument of sasine, in the form authorized by that Act, being declared, when registered, equivalent to the delivery of symbolical possession followed by an instrument of sasine in the old form, and registration thereof.¹ By the Titles to Land Act of 1858, the instrument of sasine has been rendered wholly unnecessary; and registration of the charter, with warrant of registration thereon, in the Register of Sasines, is declared to have the same legal force and effect as if the charter, so recorded, had been followed by an instrument of sasine duly expedite and recorded.²

The charter and publication thereof (duly warranted) in the Register of Sasines are thus the means now used to accomplish what was done, at first, by the ceremony of investiture in presence of the *pares curiæ*. In that ceremony, we had the grant and the investiture with actual possession by way of publication. Afterwards, we had the charter with separate precept, and the sasine; to which, by-and-bye, registration was added. Then, the charter with precept incorporated, sasine, and registration. In those stages we had the grant, the delivery of symbolical possession, and the publication to all concerned, in an effectual manner. The delivery was, subsequently, made mere matter of form; the grant, with an instrument of sasine and registration, remaining as before. Now, as I have said, delivery is dispensed with, and the only essentials are,—the grant and the effectual publication thereof (duly warranted) to all concerned by registration.

I proceed to examine the deed, or deeds, in use for accomplishing the constitution of a new feudal estate. An original feudal estate is constituted, as I have just explained, by the single writing called a charter,—strictly an original charter, as contradistinguished from one of those charters which are required by new owners from their superiors, from time to time, for the completion of their titles, and which are technically called charters by progress. An original feudal estate then is constituted by an original charter, and by registering the same, with warrant of registration thereon, in the Register of Sasines for publication. But it is necessary to be acquainted not only with the forms of the writ now in use, but likewise with the forms of the corresponding writ previously employed, and of the instrument of sasine in its several forms. Because, in judging of the validity of the titles of any feudal estate, it is requisite to carry back the examination for not less than forty years; and charters, in the older forms, and instruments of sasine, will, for a long period, be comprehended in such examination. Besides, the forms of writs introduced by the modern Conveyancing Acts were not intended to

ORIGINAL.
CHARTER.

¹ 8 & 9 Vict. c. 35, ss. 1, 2.

² 21 & 22 Vict. c. 76, s. 1.

have effects different from writs and deeds in the older forms. The modern forms are merely abbreviations, having, by Statute, effects equivalent to the older forms. Full acquaintance with the whole is therefore necessary, more especially as the Acts are not absolutely imperative. They do not preclude the employment of the older forms.

LANGUAGE
USED IN
CHARTERS.

Charters, in this country, used in early times to be written in Latin. The deeds of conveyance in use amongst the Continental nations which had adopted the feudal system were expressed in that language; and the introduction of the system into Scotland brought with it, as applicable to conveyances, the language in which the Continental deeds were written. Latin continued to be employed in charters from the Crown till the time of Cromwell, who substituted the English language. After the Restoration, the Latin was again adopted;¹ but by the Crown Charters Act of 1847, the use of Latin was again discontinued.² Crown charters, and the sasines thereon where required, are now all written in English. Charters from subject superiors, and sasines thereon when required, are likewise all written in English; and they have been so, almost without exception, for 150 years and upwards. The names of several of the clauses in charters, whether from the Crown or subject-superior, were taken from the first words in these clauses respectively in the Latin writs; and these names have been retained as applicable to the same clauses, though the clauses are now always in English.

PROVINCE OF
THE ORIGINAL
CHARTER.

It is the peculiar province of the original charter to specify the grant, and express the conditions on which the grantee, or vassal, is to hold the same of and under the granter, as his superior,—in other words, the manner of holding, and the annual payments, or prestations, to be made to the granter by the grantee. The subsisting manners of holding (other than burgage, with which we are not now dealing) being feu-farm and blench-farm, the charter may constitute a holding, either in feu-farm, for payment of an annual feu-duty in money, grain, or otherwise; or in blench-farm, for payment of one penny Scots yearly, or other elusory duty. As regards form, the charter with one manner of holding is very little different from that with the other. And, in proceeding to consider the feu-farm charter, I will notice the distinctions applicable to the blench-farm as occasion requires.

NARRATIVE
CLAUSE.

The clauses of the charter are—(1.) The narrative or inductive, describing the granter, specifying the cause of granting, and, in connexion therewith, usually describing the grantee. This clause is not affected by the recent Conveyancing Acts. The descriptions of the parties, as was explained in a former branch of the course, ought to be such as clearly to distinguish them from all others. The granter is usually further described as 'heritable proprietor of the lands after disposed;' but it is not by any means necessary that these, or equivalent words, should be introduced in the charter. The granter must, however, be heritable proprietor, otherwise he cannot validly grant the charter; and it ought to be

¹ Act of Sederunt, 6th June 1661.

² 10 & 11 Vict. c. 51, s. 25.

seen that he holds in virtue of a registered charter, with the force and effect of a sasine; or that he is actually infeft—that is, that his title is completed by registration or sasine—before he executes the new or original charter; otherwise such charter, though valid as constituting an obligation, and as a warrant or foundation on which to obtain a real right, will not operate as in itself the warrant for such right.

In the simple form of the feu-farm charter, the narrative runs thus:—
‘I, A.,’ (with or without the further description of ‘heritable proprietor of the lands after disposed’) ‘in consideration of the feu-duty and other ‘prestations hereinafter stipulated to be paid to me.’

Where the charter is to constitute a holding in blench-farm, there will in general be a price paid down; in which case the charter will be granted ‘in consideration of the sum of £ , being the agreed-on ‘price of the lands after disposed, instantly paid to me by B., of which ‘I hereby acknowledge the receipt, and discharge him.’ The blench-duty, being elusory, will not be noticed in this clause.

The above is the case of a charter by a proprietor in the full and unencumbered right of the lands. But charters and other deeds of transmission are frequently granted by husbands whose wives have liferent-provisions secured over the lands, or whose right of terce is not excluded; or by proprietors whose lands are burdened with debt; and in these cases (particularly where the wife has a liferent-provision, by virtue of a deed in her favour) it is usual to make the deed run in name of the proprietor, with consent of his wife, or with consent of the heritable creditors, or of any others having some interest, or supposed interest, in the lands. Though the wife’s terce be not excluded, it is not very usual to make her a consenting party, because the grantee of the charter can obtain a real right, preferable to hers, by making his own right real during the grantor’s lifetime. Terce is available to a wife only as to lands in which her husband had a real right at the time of his death; and, by denuding him of such right, the claim of terce is excluded as effectually as if the wife had renounced it, or had concurred with her husband in disposing the lands. The case is different when the wife has a provision secured to her by virtue of a deed. Such right will subsist notwithstanding the sale of the lands by the husband, and the completion of the purchaser’s title; and therefore the purchaser requires to obtain the wife’s concurrence in the conveyance in his favour, in order to be protected against claims on her part. As regards heritable creditors, their consent to the charter is not the most satisfactory mode of proceeding, in order to exhibit on the record a clear title in favour of the purchaser; because the consent does not appear in the minute-book of the record, in such a way as to show that the consenter’s claim is excluded or given up. But the consent will certainly have the effect of preventing the consenter from quarrelling the deed, in respect of any right or interest subsisting at the time of granting the consent. Whether a mere consent, without words of formal conveyance, will operate the actual transfer of any real right

CONSENTING
PARTIES.

TERCE.

EFFECT OF
CONSENT.

in the person of the consenter, is a question discussed by Erskine,¹ who, in opposition to Craig's opinion,² says that the simple consent of a party who has truly the right to the lands validates the conveyance to the new vassal, or at least founds an action of adjudication in implement against the consenter,—that is, authorizes the new vassal to obtain a judicial conveyance in conformity with the charter. This view appears to be supported by an old case, in which a disposition by a father, who was liferenter, with consent of his son, who was fiar, was held equally binding against the son as if he had been a principal disponer.³ In two subsequent cases,⁴ where the principal disponers had no title whatever, and the title was exclusively in the consenters, the Court held that the consent operated concurrence in the conveyance. In the earlier of these, the Court were unanimous in holding that the consent of the proprietor to the conveyance *a non domino* implied a conveyance by the party, 'as what could have no other intention or meaning.' In the other case, Baron Hume says, the point we are now discussing did not receive much consideration; and his own observations on this question are worthy of attention, as indeed they are in every case. He points out that, although the consenter may himself be barred from challenge, the question might assume a different aspect if maintained with an onerous and *bona fide* donee of the true owner, who had got infeftment, and who could argue, with great effect, that the mere consent did not involve such an act of dominion as could transmit the property. This view coincides with that contained in Steuart's Answers to Dirleton's Doubts.⁵ At the same time, I think it may fairly be argued that the consent of the owner is as good as a commission or mandate to the principal disponer, authorizing him to grant the disposition. A consent to grant is very much the same as a bestowal of power to grant, which last would be quite effectual. But no Conveyancer should ever allow the question to arise. The safe and simple course is, to make all the parties who are, or claim to be, proprietors, concur in the deed as principals, granting not only the dispositive, but likewise all the executive, clauses with 'joint consent and assent.' Where the consent is given by a creditor, it imports simply *non repugnantia*; that he will not, for his interest, quarrel the right granted to the donee. It does not imply a conveyance to the donee of the debt due to the creditor, or a right to the donee to use the debt in support of his title. In order to have such right, the donee must obtain from the creditor an express conveyance of the debt, not a mere consent to the conveyance of the lands by the owner.⁶

When the lands to be disposed belong to a married woman, she is the principal party in granting the deed, which runs thus:—'I, A., wife of B., and heritable proprietor of the lands after disposed, with the special

¹ Erskine, ii. 3. 21.

² Craig, iii. 1. 29.

³ Moncrief, 24th July 1691, Harcarse, 171.

⁴ Bucha 12th Dec. 1739, M. 6528,

Ross's L. C. i. 33; and Mounsey, 29th November 1808, Hume, 237.

⁵ Steuart's Answers to Dirleton's Doubts, voce Consent.

⁶ Buchan, *supra*.

'advice and consent of my husband; and I, the said B., for myself and my own right and interest, and as taking burden on me for my said wife; and we both, with joint consent and assent, in consideration,' etc. When trustees, or minors or others, with consent of guardians or others, are the granters, care will be taken to describe the character of the granters or consenters, and the deed under which they act. The particular variations of style applicable to these cases will be found in the Style Book.¹

As regards the statement of the cause of granting, I think it enough to refer to what was formerly said when we were considering the narrative clause in general, and also to the necessity, imposed by the Stamp Acts, of stating the full amount of the price when any is paid. CAUSE OF GRANTING.

(2.) I proceed to the dispositive clause, which embodies the finished act and will of the granter relative to the disposal of his property, and is the most important clause of the charter. Professor Bell observes, that the dispositive clause contains the essence of the charter, which is the grant; and that, if the deed were to stop there, sasine might be obtained by means of a separate precept, or by the judicial process of adjudication in implement of the disposition.² This would hold true as to the transfer of an existing feudal estate. But it is to be remembered that the feu-charter, though in one sense a deed of transmission, is so by constituting or creating a new feudal estate; and not only are the words of every dispositive clause in a conveyance of lands necessary in the feu-charter, but the manner of holding, and the conditions of the grant, or obligations to be performed by the vassal, require to be specified. These particulars are not usually expressed in the dispositive clause, but in subsequent clauses; and Professor Bell's observation, as far as it relates to an original feu-charter, is therefore to be taken subject to an important qualification. DISPOSITIVE CLAUSE.

The dispositive clause, in a feu or blench charter, is intended to express the present dispositive act of the granter. It runs thus: 'Do hereby sell and in feu-farm' (or 'blench-farm') 'dispone to the said B., and his heirs or assignees whomsoever, heritably and irredeemably, all and whole,' etc.

The terms expressive of the dispositive act vary according as the grant is onerous or gratuitous. When the grant is gratuitous, the words will be 'give, grant, and in feu-farm' (or 'blench-farm') 'dispone;' and, when such words are used, Craig holds them to import a gift.³ When the grant is onerous, they will be as in the form above given, 'sell, and dispone,' which word 'sell' Craig holds to import a sale.⁴ But, although the words 'give, grant,' or the word 'sell,' are thus important, and the appropriate terms ought always to be selected, there is no word positively essential to the full accomplishment of the purpose of the deed as a *de præsenti* conveyance, and a direct warrant for divesting old and investing the new proprietor, unless it be the word 'dispone.' The use

¹ Juridical Styles, p. 20, 99, *et seq.*

² Bell's Prin. s. 760.

³ Craig, ii. 3. 18.

⁴ *Ibid.*

DISPOSITIVE
WORDS.

of that word has been declared essential for accomplishing the above purpose. It is to be kept in view, however, that the cases, in which the essential necessity for the use of the word 'dispone' in a conveyance of land has been enunciated, have been those of testamentary and gratuitous grants; not of onerous sale, as the grant in a feu-charter usually is. I will here notice the most important of these cases.

1. We have first the case of Ogilvie,¹ where an attempt was made to have effect given to the expression of an intention, contained in a testamentary deed, as the foundation of a title to land; but it was found that nothing would suffice but present dispositive words. Lord President Campbell said, 'An estate cannot, by the law of Scotland, be conveyed by mere will. It requires a disposition, or an obligation to disporre.'

2. I refer next to the case of Simpson.² The deed in that case was a latter will executed at Buenos Ayres. By a subjoined writing, the testator declared it to be his will that his sister and her heirs should enjoy his estate, and requested that the above 'disposition' (by which he meant the will) might take effect, as he had no lawyer to advise him better. The Court found the will not sufficient to convey the lands. By the narrowest majority, they held it effectual as an obligation on the heir to convey to the testator's sister. But this judgment was strongly censured in a subsequent case.³ Lord Braxfield was 'very clear, that it was ill decided;' and held it 'to be an inviolable rule of the feudal law of Scotland, that an estate 'cannot be conveyed by mere expression of will. There must be words 'de præsenti conveying the lands.' Another eminent Judge said, 'There 'cannot be an opinion more hurtful to the feudal law of Scotland than 'that a deed, though not in itself a settlement, may be held to be an 'obligation to disporre.'

3. We have also the case of Stewart,⁴ where the words used were 'leave and bequeath;' and the deed, which was a testament, was found ineffectual either as a conveyance or an obligation to convey.

4. Lastly, on this point, I refer to the opinion of Lord Meadowbank in the case of Hamilton.⁵ His Lordship says, 'If there is a word, in Scotch 'law language, which is technical, it is the word "disporre." If I may 'use an expression of my Lord Mansfield, I would say that I have served 'an apprenticeship to that word. There are very few technical expressions in the law of Scotland; but there are some which have been held 'essentially necessary in order to give effect to some kinds of deeds. "'Disporre" is one of them, and is held to be necessary in all conveyances of heritage. I remember once, when at the bar, of attempting 'to show that the essence of all such conveyances lay in the use of *verba de præsenti* as distinguishing them from wills, which are expressed in '*verba de futuro*, and that it was of no consequence what the words

¹ Ogilvie, 10th Dec. 1793, M. 3336, *et seq.*; 1 Ross's L. C. 13; affirmed 1st March 1796, 3 Paton's App. 434.

² Simpson, 10th Jan. 1752; Elchies, *voce* Testament, No. 12; 1 Ross's L. C. 1.

³ Montgomery, 9th June 1795, Bell's Folio Cases, 203; 1 Ross's L. C. 7.

⁴ Stewart, 16th Nov. 1803, Hume, 881.

⁵ Hamilton, 3d March 1815, F. C.

'employed were. That was my argument, and I laboured hard to make out that "give" and "grant" were quite enough, but it would not do. I lost the cause unanimously. I could not gain a single Judge on the bench. There was the unfortunate word "bequeath" tacked in. The word "dispone" was held to be technically necessary, and I was not listened to.'

These, however, are all cases of testamentary and gratuitous conveyances. Whether the words 'give,' 'grant,' 'convey,' and 'alienate,' or others of similar import, would be sufficient in such cases, if employed as words of *de præsenti* conveyance, and without the use of the word 'bequeath,' or some similar term having reference to *de futuro* conveyance, does not appear to be yet decided. In the cases before referred to, the deeds were held null. But a feu-charter is usually an onerous deed; and, when it is of that character, there can be no doubt that, even without the word 'dispone,' it would be effectual as a conveyance and obligation to invest the new proprietor. Without that word, it may not be effectual as a direct means of divesting the old and investing the new proprietor; but, at all events, it will be effectual as an obligation, and, if necessary, the foundation of a suit, at the new proprietor's instance, for obtaining a judicial conveyance and investiture,—that is, an adjudication in implement. But, whilst I have pointed out what appears to be the real state of the question as regards this word 'dispone,' and specially the remedy, in case it is omitted in an onerous feu-charter,—it ought, for the present, to be regarded in practice as the rule, that a deed, in order to be an effectual conveyance of lands, and a warrant for investing the disponent, must contain words expressive of *de præsenti* disposition,—the present dispositive act of the granter,—and amongst these the word 'dispone.'

OMISSION OF
'DISPONE' IN
FEU-CHARTER.

Following the words 'give and grant,' or 'sell,' and 'dispone,' is the name of the disponent, or his name and designation, if he has not been designated in the narrative or inductive clause,—with the destination to 'his heirs or assignees whomsoever,' or such other destination as may be agreed on. In regard to the name and designation of the disponent, I have only to remind you of the necessity of accuracy. The party ought to be described so as clearly to distinguish him from all others.

DESIGNATION
OF DISPONENT.

The destination to heirs is always inserted; but if an original charter be granted simply to A., without any destination over, it is of the same legal effect as if it were conceived to A., 'and his heirs or assignees whomsoever.' The case would be different if the destination to A. were followed by a substitution to B., with or without further substitutions. In such case, if it can be shown from the terms of the deed to have been the intention of the parties, the lands will fall to the children of A., if any; on the principle that the substitution to B. was granted under the implied condition that A. should die without leaving heirs of his body. But in the general case, and certainly if it were shown by the deed not to have been the intention of the parties to

DESTINATION.

favour A's children, the lands (on the death of A.) would fall to B. ; and, even when A's children should succeed, the lands, in case of their failure, would fall not to A's other heirs, but to B., as specially called by the charter to succeed, in preference to such other heirs. When considering the signification of the term 'heirs,' in connexion with the moveable or personal bond, I noticed that it was a relative word of flexible meaning, and when used in the bond was to be understood as pointing out the heirs in moveables, that is, the next of kin generally. In the charter, on the other hand, the subject disposed being heritable, the term means heirs in heritage, as contradistinguished from the next of kin. Should the destination be to special heirs, as, for example, the heirs of the vassal's body, and should all these heirs fail, the lands will fall to the vassal's nearest heirs-general ; and, supposing no one can establish a right as heir, the lands will fall to the Crown as *ultima hæres*. They do not revert to the superior, without a special clause in the charter to bring them back.

EFFECT OF DIS-
CREPANCIES
BETWEEN DIS-
POSITIVE AND
EXECUTIVE
CLAUSES.

In examining charters framed according to the older form, we occasionally find a repetition of the destination to heirs in the executive clauses then in use, viz., the obligation to infeft, and the precept of sasine ; though these clauses need not have contained more than a reference to the destination, as in the dispositive clause. Such repetitions were rendered obsolete by the introduction of the statutory forms annexed to the Conveyancing Acts of 1845 and 1847 ; and now the obligation to infeft and the precept of sasine are not even necessary clauses in the charter.¹ Whilst they were in use, in their older form, they were a source of error, as discrepancies occasionally crept into them. But, where the clauses respectively were disconform to each other, the dispositive was the ruling clause. Thus, where the fee of the lands was, by the dispositive clause, given to A., and the precept of sasine directed sasine, or delivery of the fee, to be given to B., the right of fee was held to be in A. The disposition, as regarded A., was held to be a conveyance without precept of sasine ; and, though sasine passed on such precept in favour of B., the fee was not thereby vested in him ; because the preceding act of disposition was to A., and not to him.² Again, when the disposition was granted to A., and the heirs-male of his body, and one of the executive clauses was in favour of A., and the heirs of his body,—which last, if standing by itself, would have meant heirs-general of the body,—the dispositive overruled the other clause, and excluded the heirs-general of the body of A. ;³ but, where the dispositive clause in an entail was in favour of A., and the executive clauses were in favour of the said A., and the heirs-male of his body, there being nothing positively inconsistent between the two, the executive were allowed effect, as supplementing the dispositive.⁴

¹ 21 & 22 Vict. c. 76, s. 5.

² Shanks, 27th Jan. 1797, M. 4295 ;
Ross's L. C. i. 42.

³ Forrester, 11th July 1826, 4 Sh. 831.

⁴ Sutherland, 26th Feb. 1801, M. App.
roce Tailzie, No. 8 ; Ross's L. C. i. 45.

The destination, in the charter, is in favour of the grantee's assignees DESTINATION TO ASSIGNEES. whomsoever, as well as his heirs. Whilst vassals had no power to dis-
 pone their feus to strangers, or singular successors, these words were
 held to authorize a disposition in favour of a stranger, at any time before
 the vassal's right was made real by infestment. He was entitled, before
 being infest, to assign his right to a third party, who thereupon, in
 virtue of the charter to A. and his assignees, and of A.'s assignation,
 obtained infestment, and became the vassal.¹ Now, the right of assigna-
 tion (if not expressly excluded) is complete without the destination to
 assignees, as much as with it.

I have here to remind you of the rules relative to dispositions to CORPORATIONS.
 corporations or to companies. The former are, by law, entitled to hold
 land, their erection or constitution giving them a separate *persona* to
 that effect. Joint-stock companies, and banking companies incorporated
 under the Acts of 1856, 1857, 1858, and 1862, have the same privilege;
 the extent of the land which they may hold being in certain cases, as
 already noticed, limited to two acres, unless extended by the Board of
 Trade.² In these cases, the charter will be granted to the corporation in
 its corporate name, or otherwise, according to the rule laid down in the
 Act of Parliament, or charter, or letters-patent of incorporation. Thus, in
 the case of the Bank of Scotland, the titles are made out in favour of
 'the Governor and Company of the Bank of Scotland.' Charters to
 royal burghs will be granted to the provost, bailies, and remanent mem-
 bers of the town council, and their successors in office, for behoof of the
 whole body and community thereof, and to their assignees. In the
 Style Book, the style given specifies no names;³ but I think it would be
 better, and certainly it can do no harm, to name the existing office-
 bearers.

Unincorporated companies, however, are incapable of holding lands; UNINCORPORATED COMPANIES.
 as the feudal law—when not bending to contrary provisions, imposed by
 Act of Parliament, or other competent authority—requires that there shall
 be one or more individual vassals. In the constitution of a corporation,
 the power to hold lands is specially given, and the feudal difficulty is
 thereby got over. But companies formed by private parties have no such
 privilege.⁴ In Morison's case, the disposition was granted to 'Robert
 Muirhead and Co.,' and the form of title thereby constituted was found
 ineffectual. But where the disposition of lands, purchased by an unin-
 corporated company, was granted to 'John Gillies, manager, and one of
 'the partners of the Dalnotter Ironworks, belonging to Messrs. Murdoch,
 'Gordon, Gillies, and Co., and to the other partners of the foresaid com-
 'pany, according to their respective rights and interests,' it was held that,
 if the partners (other than John Gillies) were not immediately invested by
 the disposition, at least the disponent was divested, and the full right

¹ Stair, ii. 4. 32; Erskine ii. 7. 5.

³ Juridical Styles, i. 115.

⁴ Morison, 18th June 1818, Hume, 720.

² 19 & 20 Vict. c. 47; 20 & 21 Vict. c.
 14 & 49; 21 & 22 Vict. c. 60 & 91; and

25 & 26 Vict. c. 89.

transferred to the individual who was named and designed.¹ The usual and correct course, however, where lands are acquired by such companies, is to make the disposition in favour of one or more of the partners, and the survivors or survivor of them, in trust for the company, and existing and future partners, according to their respective rights and interests in the stock of the concern.

After the destination to heirs and assignees, we have the expression, 'heritably and irredeemably,' which, though universally employed, is not necessary to make the charter an irredeemable conveyance. It would possess that character, unless perhaps in very special circumstances, if the contrary were not expressed. It is advisable, however, to introduce these words, as well as the destination to heirs and assignees, because it is best in such matters to adhere to universal style.

DESCRIPTION
OF LANDS.

We have next to consider the description of the lands disposed; and what is said on this point is to be understood as referring, not only to the description of lands in an original feu-charter, but also, and even still more, to that in the disposition of an existing fee or feudal estate. The great point is to secure that the description shall embrace everything intended to be disposed; that it shall not contain anything not intended to be disposed; and that the subjects disposed shall be capable of clear and absolute identification. The description may be either general or particular. If general, care is required to make it sufficiently comprehensive without embracing too much; if particular, to see that it omits nothing which ought to be included. Thus far no change has been made by the Titles to Land Acts; but by the Act of 1858, sects. 15 & 16, special modes of abbreviating or of generalizing descriptions, which it is of importance to keep in view, were sanctioned; and a further change, or rather an amendment on the Act of 1858, as regards this point, has been introduced by the Titles Act of 1860. I do not consider either Act, however, to have introduced a novelty in principle, in these particulars, but only to have given practical extension to a principle previously recognised.

GENERAL
DESCRIPTION.

If the lands disposed have been united, and erected into a barony (which can be done only by the Crown), then, the barony being *nomen universitatis*, a detailed specification of its constituent parts is not necessary. The conveyance of the 'barony,' generally, will comprehend every component part, whether specified or not.¹ Hitherto, it has not been usual to dispoise simply 'the barony.' Baronies are created by charters of union and erection from the Crown, which, as well as the subsequent titles, almost invariably contain some specification of the component parts; and the rule of practice, when the whole barony was to be disposed, has been to adhere to the description contained in the existing titles. The proprietor was in possession upon these titles. The dispoinee was to take his place; and nothing could more clearly indicate that purpose, or more effectively carry it out, than to take from him a

¹ Denniston, 16th Feb. 1808, M. App. Tack, No. 15. ² Argyle, 15th Jan. 1668, M. 9631.

disposition of what was in his titles, and neither more nor less. The same rule of practice was universal in cases where the charter was to contain the whole of the granter's estate, even if there had been no union and erection into a barony. The course considered safest, and generally adopted, was to make the dispositive clause embrace all that was in the granter's titles, and to take the description *verbatim* from the titles.

Another mode of proceeding, which might be competently adopted, was to frame the description by reference to the granter's titles, or to a certain deed, specified by its date and the names of parties, and, if necessary, other particulars; or by saying 'all my lands situated to the north,' or otherwise, relatively to a road, or river, or other distinct landmark;¹ and the description, though general, might be effectual, without reference to any particular deed.² The description in the case of Graham's creditors (which, however, was in a heritable bond, where greater latitude was practised in framing descriptions than was usual in a charter) was of 'All and sundry lands, heritages, and others whatsoever pertaining to me, wherever the same lie in this kingdom.' And the Lords were of opinion, 'that a precept to give infestment in lands, 'described, in general, to belong to the granter, is a sufficient warrant to 'give infestment in every particular tenement, which, by production of 'the granter's infestment, is vouched to come under the general description.' As the law then stood, it was necessary to go to the ground of the lands in which sasine had to be given, and there to deliver symbolical possession. Charters, therefore, with such descriptions, though perfectly valid as dispositions, did not by themselves form sufficient warrants for giving sasine; because they did not by themselves specify the lands which they embraced. The deed or titles referred to—the granter's infestments—were required, in addition to the charters, to instruct what was disposed,—to liquidate, as it were, the general description. The same rule held, even after it was rendered unnecessary to go to the ground of the lands, in order to give sasine or infestment. The charter, with the general description, was a good warrant for the sasine; provided there was shown, by competent proof, what were the lands to which it applied. The simplest mode of doing so was to produce and narrate along with the charter, as warrants of the sasine or infestment, the infestments of the granter of the general conveyance.

The Titles to Land Acts have advanced further. As already stated, we no longer require to go to the lands in order to give sasine. We no longer require to give sasine, even in words or form. The registration of the charter, with warrant of registration annexed, produces the same effect as the completed and recorded instrument of sasine formerly did. And, provided that a particular description of lands can be referred to, as contained in any recorded instrument of sasine or other deed, the Acts supply the means of making the conveyance effectual, and the

DESCRIPTION
BY REFERENCE.

MODES OF
DESCRIPTION
SANCTIONED BY
THE TITLES TO
LAND ACTS.

¹ Belches, 21st Jan. 1815, F. C.

² Graham's Creditors, 3d August 1753, M. 49.

registration thereof equivalent to *sasine*, without the insertion, in the conveyance, of the particular description of lands.

PROVISIONS OF
ACT OF 1858.

Two modes of proceeding for this purpose were allowed by the Act of 1858. By sect. 15, it was enacted, that where lands had been particularly described in any prior conveyance or other writ, duly recorded in the appropriate register of *sasines*, it should not be necessary, in any subsequent conveyance or writ, containing or referring to the whole or part of such lands, to repeat the particular description of the lands at length; but it should be sufficient to specify the leading name or names, or other short distinctive description of the lands conveyed, and the name of the county and parish, or supposed parish; and to refer to the particular description contained in the prior conveyance or other writ so recorded, in manner set forth in Schedule L, No. 1, annexed to the Act; which specification and reference are declared equivalent to the full insertion of the particular description contained in the prior recorded writ.¹

And by sect. 16, where several lands are comprehended in one conveyance, in favour of the same person, it is made competent to insert a clause in the conveyance, declaring that the whole lands therein particularly described shall be designed and known in future by one general name, to be therein specified; and, on the conveyance containing such clause being duly recorded in the appropriate register of *sasines*, it is declared competent, in all subsequent conveyances, or other writs, to use the general name specified in such clause, as the name of the several lands declared by such clause to be comprehended under it. A conveyance of such several lands, under the general name so specified, is declared as effectual as if the conveyance contained a particular description of each of such several lands; provided always that reference be made, in such conveyances, to a prior recorded conveyance, or instrument of *sasine*, or notarial instrument, or other writ, in which such clause and description are contained. The clause of reference may be in the form of Schedule L, No. 2, annexed to the Act.²

Neither of these forms was applicable to what may be technically called new descriptions,—that is, descriptions of portions of one or more existing subjects, if such portions are not contained in any prior conveyance or writ. Neither were they applicable, unless there had been a particular description in some prior conveyance or writ duly recorded in the appropriate register of *sasines*. This requisite must be carefully attended to, but it does not seem to call for special remark; and sect. 16 of the Act of 1858 is applicable only to cases where there are several lands, for example, the lands of A. and B. This section would not be applicable to a conveyance of the lands of A. only. What had to be done, in cases where there was already a particular description contained in a conveyance or writ recorded as above, was,—(1.) To give the leading name or names, or other short distinctive description of the lands; (2.) To name

¹ 21 & 22 Vict. c. 76, s. 15, and Schedule L, No. 1.

² 21 & 22 Vict. c. 76, s. 16, and Schedule L, No. 2.

the county and parish, or supposed parish, in which the lands lie; and (3.) To refer to the recorded conveyance or writ containing the particular description. From what I have already stated, you will have seen that a conveyance without these statutory specifications is good and valid as a conveyance, and that, even if perfectly general, it will be a good conveyance, and will enable the disponent to obtain a title. The change introduced or sanctioned by the Statute of 1858 was to the effect that conveyances, with descriptions in the forms there pointed out, should be good, not merely as conveyances, enabling the disponent to obtain a title, but as actually conferring the title, and sufficient when recorded to complete the title as a real right; and that of themselves, and without the collateral or explanatory supplement. The distinction is, that, whereas formerly the conveyance with the general description could be supplemented, as the warrant of a special title, by the production of writings instructing what it comprehended, the conveyance, with the abbreviated description, in the statutory form, was of itself, and without supplement, equivalent to a special title. In the former case, the deeds, with the particular descriptions, were produced and narrated along with the conveyance and general description; and their contents were thereby imported into the record; whether they were recorded writs or not. Under the Act of 1858, these, being necessarily recorded writs, were merely referred to as part of the abbreviated description.

The use of sect. 15 of the Act was very critical, and must often have been matter of difficulty in practice,—at least I found it so; because it was not easy to say what were ‘the leading name or names,’ or to find a suitable ‘short distinctive description,’ of lands, as contained in existing titles. But the clause was valuable, as affording authoritative sanction to the abbreviation of the descriptions of lands. It is now repealed by the Titles Act of 1860,¹ which allows the same effect to a simple general reference to the description contained in a previously recorded deed or instrument, which was formerly allowed to such reference with the leading name or names. It is, moreover, no longer necessary to specify the parish in which the lands lie. In lands held by feudal tenure, the county must be specified. This new enactment wholly relieves the difficulty experienced under the Act of 1858, as regarded the ‘leading name or names of lands.’ Sect. 16 of the Act of 1858, apart from its relative schedule, to which I shall presently refer, was much more simple than sect. 15 as a practical guide. Read by itself, it is the statutory authority for a clause of union, under which separate subjects, having one general name given them, can be conveyed by such general name, just as if the lands had been united and erected into a barony. The section requires that the general name shall be given in a conveyance describing all the lands by their particular description, and declaring or pointing out the general name by which they are to be known in future. For example, the lands belonging to the Sutherland family may have

PROVISIONS OF
ACT OF 1860.

¹ 23 & 24 Vict. c. 143, s. 34.

the general name given them of 'The Sutherland Estate;' or the same lands may be made the subject of two unions, each containing separate portions of the whole, one called 'The Sutherland Estate,' the other 'The Reay Estate,' or as the case may be; and what is here required is that the conveyance, giving the several lands their general name, shall itself contain a particular description of such several lands. It would not be in accordance with the Act to give the general name merely with an abbreviated description of the several lands, made up in terms of sect. 15 of the Act of 1858, or sect. 34 of the Act of 1860. Sect. 16 of the Act of 1858 cannot be worked along with, or as supplementary to, either sect. 15 of the Act of 1858, or sect. 34 of that of 1860. The Schedule L, No. 2, having reference to sect. 16 of the Act of 1858, through some oversight, directs the conveyance to give 'the leading name or names, 'or other short distinctive description of the lands conveyed, and the 'name of the county and parish, or supposed parish,' with a reference to the particular description as contained in some prior conveyance or other writ duly recorded, and then to say that the lands are, in such writ, declared to be designed and known by their general name, which is specified. It was clearly unnecessary, in this case, to have required 'the leading name or names.' The 'one general name,' authorized by sect. 16, was of course intended to be 'the leading name,' and the only name, in future conveyances; otherwise the section has no proper significance. I cannot doubt that the use of the 'one general name' would be held sufficient, both under the words of sect. 16, and because it is the leading name, and so the name pointed out in the schedule which we are considering. But the schedule in question must be followed; and any one who has a doubt as to what is meant by 'the leading name or names,' in reference to sect. 16, had best make use of the forms allowed by the Act of 1860.

**DESCRIPTION OF
ADDITIONS.**

In framing new descriptions, it may often be worth while, when there are several subjects conveyed, to give such subjects a name by which in future they shall be known and conveyed. But it will be kept in view that, where additions are made to the subjects so named, such additions, though, it may be, falling popularly under the name, and substantially parts of the property known by such name, will not pass by a conveyance merely of the lands so named. Such additions must be separately described, either by their full description, or by reference, as the case requires.

**GENERAL NAME,
WITH ENUMERATION OF
PARTICULARS.**

Passing now from the Statutes, which, of course, relate only to the practice subsequent to the dates when they came into operation, I observe that we not unfrequently meet with general descriptions, followed by the enumeration of particulars; and, where the subject is a barony, that mode of procedure is usual and correct. In other cases, also, it will be perfectly sufficient where the detail of particulars is given fully, and without exception. But the particular expressions used must be carefully examined. Thus, where the description bore to be of 'the whole

'mains, containing the lands underwritten, viz., the lands possessed by 'A., and the lands possessed by B.,' etc., the specification and reference to the tenants' possessions were held taxative, so as to confine the title to those parts of the mains which were possessed by the tenants specially named.¹ The above description shows the effect of inaccuracy in detailing particulars. Where the Conveyancer has personally the means of making up the detail, he can of course judge of its accuracy. But it more frequently happens that he has to trust to another; and in either case it is advisable to use words which will clearly embrace all particulars, whether named or not named. In such a case as that before cited, the dispositive clause, in place of saying, 'containing the lands underwritten,' should have said, 'comprehending the lands underwritten;' and, after giving the specification, should have added, 'and likewise 'comprehending all other lands and possessions forming parts or portions 'of the said mains, this disposition including the whole of the said mains, 'whether possessed by the tenants before named or not.'

On occasions when land-estates are to be disposed, which have been long possessed by the same family, and more especially when they have been of progressive growth, some risk of inaccuracy in description arises; and the late Acts leave us where we were, in this particular; because, besides the gradual absorption of contiguous or interjected properties which takes place, there is often more or less of alienation for the accommodation of neighbours, or improvement of boundaries. In these cases, the titles exhibited seldom show what has been already alienated; and it not unfrequently happens that the particulars of the occasional acquisitions are unknown to the parties transacting the sale and purchase. The description in the exhibited titles, therefore, may to a certain extent be inapplicable, as not containing all the lands to be disposed, and likewise as containing some lands which ought to be excepted from the conveyance to the purchaser. Whenever there is reason to apprehend any risk of the above nature, there ought, of course, to be the fullest preliminary inquiry, with a view to a perfect acquaintance with the facts. But it may occasionally be necessary, and will always be safe, to make use, by way of supplement, of an authentic plan, containing all the lands actually disposed; and to make use of language in the description which will identify the lands conveyed with those laid down on the plan, and which will exclude from the conveyance lands not laid down on the plan. In connexion with this point, I have to direct your attention to a case, where it was intended to dispose the whole lands composing an estate, known generally as Hillside; and, through unintentional error, the deed was confined to 'the lands of Hillside' only, being an inconsiderable portion of the whole estate.² That was a case of redeemable disposition; but it proves the liability to error in similar cases, and enforces the necessity of caution in all. There are also cases

¹ Murray, 1st Feb. 1634, M. 2262.

813; affirmed 10th April 1835, 1 Sh. &

² Mansfield, 28th June 1833, 11 Sh. M'L. 203.

in which portions of lands contained in a general title, or interests connected with such lands, have been sold, without notice of this appearing in the existing titles exhibited. This we meet with in reference to small as well as large properties. In disposing what remains, these portions or interests should of course be excepted, or some words should be used to show that the subject is sold just as the seller possesses it. In one case, a party who had created a negative servitude over his lands, which did not appear from his titles, afterwards sold the lands to another without noticing the servitude; and it was held that either he must purge the servitude, within a reasonable time, or the purchaser of the lands would be free of his bargain.¹ But, where the subsequent purchaser was in the knowledge of a previous partial sale, he was held barred, *personali exceptione*, from claiming the part sold, although comprehended in his title, and not disposed to the prior purchaser.²

Hitherto, I have been considering, for the most part, the case of charters which dispoise the whole lands belonging to the granter. Such cases more frequently occur in reference to dispositions,—I mean deeds which do not constitute a new feudal estate, but which transfer an estate already existing. But what is said on the subject of the description of lands is applicable to the case of dispositions equally with charters.

NEW DESCRIPTIONS.

When a portion only of an estate is to be disposed, the rules, already stated, of adopting the existing description of the lands, or as to describing by reference to existing titles, or by 'one general name,' ought to be followed, if there is in the existing titles a separate description clearly belonging to the lands sold exclusively, or if the case admits of description by reference, or by one general name. More frequently a new description requires to be framed in such cases. Take, for example, the case of the sale of a particular farm on an estate. In that case, there will very seldom be a corresponding description in the titles. Originally the names in the titles were no doubt those of the possessions existing at the time; but when, from the improved status of the tenantry, and other causes, small possessions have been thrown together into one farm, the leading name only is kept up, as that of the 'farm,' and the others gradually die out. On the other hand, lands which in earlier times formed a single possession,—an unimproved muir or common, for example,—and were known as such by a single name, have, through agricultural improvement, grown into several farms. In these cases, as we may find names in the titles corresponding with the names of the possessions, it might, at first sight, appear safe and right to dispoise simply the lands bearing in the titles the name corresponding to that of the farm as purchased. But in the one case such a course would embrace less, and in the other more, than is intended. The description, therefore, in most cases of the sale of particular farms, forming portions of larger estates, should be such as 'All and 'whole the lands and farm of A., as possessed by B., the tenant thereof, 'extending to acres or thereby, imperial measure.' The difficulty now

¹ Urquhart, 2d June 1835, 13 Sh. 844.

² Lang, 29th June 1813, F. C.

referred to will be illustrated by reference to the case of Livingstone,¹ where a party possessing two contiguous properties, held by separate titles of different superiors, built a dyke cutting off 300 acres from the one, and adding them to the other. He then sold the property to which the acres had been added, disposing the same by the description contained in the titles, without disposing specially the 300 acres added to the lands, but simply declaring the dyke to be the boundary of the lands sold. He afterwards sold and disposed the other property, described as in the titles, and without either excepting the 300 acres, or noticing the dyke. In a question between the two purchasers, it was held that the feudal title to the 300 acres was in the second purchaser. These cases show the importance of anxious care in describing correctly the subject intended to be disposed by the charter; and I again remind you that the late Acts do not affect such cases.

In such cases, that is, where portions only of the estate are disposed, it is frequently of great consequence to ascertain and specify of what particular lands, that is, of what particular feudal tenement, as described in the titles, the lands disposed form portions. The object of this is to afford *data* on which to apportion *cumulo* feu or blench duties; or to have valued teinds and stipends divided between the lands sold and the lands retained. No doubt these *data* can be supplied otherwise, in case of omission to state them in the charter or disposition. But the simplest course is so to state them; and, in the case of the transfer of an existing feudal estate by disposition, this is even of more consequence than in the case of creating a new estate by charter. Suppose, for example, that the seller's estate consists of several distinct parcels or tenements holden of several superiors,—if the disposition speaks of the lands simply as part of the seller's 'estate,' it does not show of what parcel the lands form a portion, or to what superior the purchaser has to go for an entry, and the completion of his title. The difficulty of ascertaining the state of the fact will always increase as time passes on; whereas, if the necessary inquiries are made at the first, the point is satisfactorily settled at the proper time, and there is no trouble afterwards.

The only other case of description which, I think, requires special notice, is that in the charter of a small lot of ground intended for a villa or other building. Here, there is no existing description; and it will generally be found convenient, if not actually necessary, to make use of a plan in supplement of the description by language. I would not dispense, in any case, with the description by language, which is of special importance with reference to future transmissions; as, were a mere plan used, nothing could be done without the plan, and it is desirable to have an independent description. But a plan may be used in supplement with advantage; and it will often be found convenient to get the plan indorsed on the charter, rather than made out separately.

Lands are very often further described by their boundaries or limits,

¹ Livingstone, 31st May 1821, 1 Sh. 45.

DESCRIPTION
OF BUILDING
AREAS.

BOUNDING
CHARTER.

especially in cases where the quantity disposed is not large. Charters with descriptions of that character are called 'bounding charters,' and the land is termed '*ager limitatus*.' Where a plan is employed to define the lands disposed, it has the same effect as the use of words declaring the boundaries.¹ The effect of the use of boundaries is to confine the disposition to what is within the boundaries; and, when lands are described as situated in a particular parish, the same effect arises, to this extent, that nothing is disposed in property which lies beyond the parish.² The same effect would of course follow the specification of the county within which the lands disposed are situated. We shall presently see that, where boundaries are not specified, even discontinuous lands may be acquired by the disponent, as parts and pertinents of his grant, supposing always that the specification of parish or county does not exclude the acquisition. But in order to such acquisition two things are necessary—(1.) a title; and (2.) uninterrupted possession for forty years. If, however, the lands are described as lying on the north side of the public road leading from Edinburgh to Glasgow, the charter cannot be quoted as giving a title, in property, to lands lying on the south side of that road. The road is the utmost point southwards to which, upon such title, possession can be ascribed; and possession for a hundred years would leave the party (as regards lands lying south of the road) just where he was at the first. But if the disposition contains simply the lands of A., and, in virtue of that title only, the lands south of the road have been possessed for forty years, then the lands south of the road are held to be parts and pertinents of the lands of A., and to pass with these lands, whether originally they were proper parts and pertinents or not. The possession in the first case is, in Lord Wood's words, in the face of title; in the second case, in support of title.³

Of the effect of boundaries, in excluding acquisitions beyond their limits, as parts and pertinents, examples are to be found in various reported cases. In an early case, the proprietor of a tenement in Edinburgh, described as lying on the east side of King's Close, had possessed, for more than forty years, a piece of ground situated on the west side of the close. He had a clause of parts and pertinents in his title; but he was found to have acquired no right to the ground west of the close.⁴ Again, where lands on the shore of the Firth of Tay were described as bounded on the south by the sea-wall dividing them from the sea-beach on the south, the disponent was held to have no right in the sea-beach lying south of the sea-wall, that is, between the sea-wall and the river.⁵ The following case is very similar. A proprietor, holding lands bounded 'by the water of Tay' on the north, disposed a portion described as bounded by 'flood-mark,' and in a subsequent title as bounded by the 'sea-flood,' on

¹ North British Railway Co., 19th Dec. 1862, 1 Macph. 200.

² Hepburn, 25th Nov. 1823, 2 Sh. 525; Gordon, 12th Nov. 1850, 13 D. 1.

³ Mackie, March 5th 1845, 7 D. 586.

⁴ Young, 17th Nov. 1671, M. 9636.

⁵ Kerr, 28th Nov. 1840, 3 D. 154; affirmed 18th July 1842, 1 Bell's App. 499.

the north; and it was held that the disponent had no right farther north than high-water mark, that is, flood-mark or sea-flood, of ordinary spring-tides.¹ And another case goes even further. Lands were held on a series of titles; the titles of one portion bearing, as the southern boundary, 'the full sea,' or, sometimes, 'the full sea, the high street intervening,' sometimes 'the common street;' and the titles of a separate property bearing 'the common passage and full sea' as the southern boundary. There had not only been possession of ground situated south of the high street or common passage, but a building, described as a lumber-house had been erected thereon, and possessed for upwards of sixty-years. But the proprietors possessed on 'bounding charters;' and the Court held that they could acquire nothing by possession beyond the high street or common passage on the south. Lord Moncreiff said: 'There is a special difficulty about the lumber-house, which is proved to have existed on the ground above sixty years without challenge. But, if we hold the titles as constituting bounding titles, that act must be looked on as a usurpation allowed to be done, and to be continued, by mere tolerance.' And so, accordingly, it was found.² In another case, it was found that, where the boundary was the sea-shore, the proprietor, whose lands were described as of a certain specified extent, had no right to enclose part of the shore covered by the sea only in ordinary spring-tides, over which the public had been, from time immemorial, in the habit of passing, and over which he could not prove any past use or possession by himself.³ But, the sea-shore being *inter regalia*, a private party has no right to complain of encroachments upon it. The Crown alone can do so; and the term 'sea-beach,' in a title, is of the same meaning as 'sea-shore.'⁴ From these decisions, it would appear that the terms 'the sea,' 'the sea-shore,' and 'the sea-beach,' are held as equivalent; and that the 'sea-flood,' or 'the full sea,' is taxative, and limited to the line of high-water in the ordinary monthly spring-tides. The Crown claims all within that line, when not made the subject of special grant. The Crown's claim does not extend higher, and specially not up to the high-water mark at the extraordinary or equinoctial spring-tides. Another rule, as to the construction of a bounding charter, is to be found in the case of Fleming.⁵ Where lands are bounded by the bank of a canal, the boundary means not the literal water-line, but the outer line of the towing-path. And, from the cases of Dick and Baird, to be afterwards quoted, we find that, where lands are bounded by a lake, the water-line of the lake in its ordinary state is meant. As regards lands situated along the sea-shore, and possessed on titles which do not lay down any boundaries, or which give the sea, or sea-shore, or sea-beach, as the boundary, we shall find presently that, in questions with the public, the owner is not confined to

¹ Berry, 10th Dec. 1840, 3 D. 205.

² Magistrates of St. Monance, 5th March 1845, 7 D. 582.

³ Smith, 11th March 1846, 8 D. 711;

affirmed 13th July 1849, 6 Bell's App. 487.

⁴ Cameron, 21st Jan. 1848, 10 D. 446.

⁵ Fleming, 12th June 1841, 3 D. 1015.

high-water mark. And though proprietors, holding on bounding charters, cannot by possession acquire other lands situated beyond their boundaries in property, they can acquire rights of servitude over lands so situated.¹

DESCRIPTION
BY MEASURE-
MENT.

Descriptions, especially of small lots of ground, frequently specify the extent or measurement of the lands as well as their boundaries; and in these cases, unless the extent is made taxative by the use of the word 'only,' or some corresponding expression, the boundaries will be held as showing what is disposed, although the extent thereby enclosed exceeds the quantity of ground set forth.² On this point, however, we are to distinguish between cases where the extent forms an essential element of the transaction, and those where it is referred to merely as demonstrative. We had occasion, formerly, to see that, where lands (of which the upset price had been fixed judicially with reference to the extent and rental of two and a half acres only) were found to contain seven acres, the purchaser was held entitled only to two and a half acres; he having the option of abandoning his purchase.³ On the other hand, where lands, sold as consisting of ninety-four acres or thereby, were found to extend to only seventy-seven acres, it was held that the purchaser 'must take his option either to abandon the purchase altogether, or be contented with what he had got;' paying the full price which he had stipulated.⁴ But, where the purchase is not made with reference to the extent or measurement, or where the measurement is stated demonstratively and is not warranted, the sale stands good, notwithstanding considerable discrepancies between the actual quantity and that specified.⁵

DESCRIPTION
OF BOUNDARIES.

There are still some minor matters, connected with boundaries in charters, which have to be noticed. (1.) If the boundary is a line between two march-stones, and the course of the line is not specified, and if there are no natural boundaries, a straight line will be presumed.⁶ (2.) If the marches are controverted at the time of the sale, the rule seems to be, that, in the general case, the marches, according to which the lands are possessed at the time, are warranted by the seller.⁷ The importance of full and even minute specification of boundaries, and of a plan in supplement, is strongly illustrated by a recent case.⁸ (3.) If the lands are enclosed by walls, these will remain with the grantor, or accompany the grant, or be made mutual property, according to the expressions used in the disposition. Thus, if the lands are described as 'bounded by

¹ Liston, 3d Dec. 1835, 14 Sh. 97. (Lord Fullerton's note.) Beaumont, 11th July 1843, 5 D. 1337, and Ross's L. C. 3. 456.

² Ure, 26th Feb. 1834, 12 Sh. 494; Fleming, 12th June 1841, 3 D. 1015.

³ Hepburn, 4th July 1781, M. 14,168.

⁴ Gray, 23d Jan. 1801, M. App. Sale, No. 2.

⁵ Brown, 1st Dec. 1813, Hume 700; Hannay, 26th Jan. 1785, M. 13,334.

⁶ Ewing, 22d Jan. 1828, 6 Sh. 417.

⁷ Bell's Conveyance of Land to a Purchaser, p. 35. Mr. Bell, after stating the rule, says, 'Hence the propriety of leaving 'nothing of this kind unexplained in such 'a transaction.' Farquhar, 7th June 1738; Elchies, *vide* Warrandice, No. 2.

⁸ Strang, 31st March 1864, 2 Macph. 1015.

the walls,' the walls will form no part of the grant, but will remain with the disponent. To carry the walls also, the charter ought to say, 'with the walls by which the ground is surrounded;' and, if it be meant that the walls shall be mutual property, the centre of the walls ought to be declared the line of the boundary. (4.) Where the charter described a field as 'enclosed by a ditch and feal dyke,' and bounded by a loan and march-stones, which lay outside the ditch and dyke, it was held that the ditch and dyke belonged in property to the owner of the field.¹ Such details as these require minute attention in framing original grants of lands, and specially the rules as to walls in connexion with charters of building or villa-grounds in or near towns. And here I may remind you that, in charters or dispositions requiring anxious clauses for protection against nuisances or on any other account, a great deal of trouble will be saved by adjusting the missives of sale or feu, with reference to completed drafts of the deed actually to be signed, rather than by a general statement of its intended provisions. The views of buyer and seller are apt to differ as to the meaning and intention of general terms; and the use of the draft, with the *ipsissima verba*, precludes the possibility of misconception.

We have now to consider what particulars, besides the *solum*, pass with a disposition of lands; and the import of the clause, 'with the pertinents,' or 'parts, pendicles, and pertinents,' usually met with in dispositions of lands. As to this point, there can be no doubt that all the real parts and pertinents accompany the lands, and fall under the disposition, whether the above clause is expressed or not. Craig's opinion is, that they follow the lands by the rule '*accessorium sequitur principale*.'² The Lord Justice-Clerk Hope says, 'A grant of the lands of A. is as extensive 'as a grant of the lands of A. with parts and pertinents. The question 'is, what lands fall under the designation of A., as known in the country, 'and by what limits are they circumscribed.'³ As a general rule, the disposition of simply 'the lands' includes everything, *a celo usque ad centrum*, forming part of the lands, or so closely connected with them as to form a natural accessory, excepting always what is specially reserved; and likewise excepting what is *inter regalia*; for pertinents of lands which are *inter regalia* are excluded without special reservation; special grant is required to comprehend them. The disposition of the lands thus includes growing woods, natural seeds though not yet sprung, natural fruits growing without culture, and not separated from the ground at the time; but not growing corn, or other fruits which require annual culture. It includes also all houses and other buildings on the lands;⁴ likewise the dial set upon an iron rod, fixed in a standard in a garden, though the dial itself admitted of being lifted off the rod.⁵ It is hardly thought that the disposition would include all such machinery and erections on the lands, as, in a

¹ Wilson, 16th Nov. 1844, 7 D. 113.

² Craig, ii. 3. 24.

³ Gordon, 12th Nov. 1850, 13 D. 7.

⁴ Downie, 13th June 1777, M. App. voce Implied Assignment, No. 1.

⁵ Nisbet, 7th Feb. 1724, M. 9628.

MILLS.

question between the heir in heritage and the executor or heir in moveables, would fall to the heir in heritage; even supposing there should be nothing repugnant to such a construction in the deed itself. Probably it would embrace all that would fall to the landlord in a question between him and the tenant; but an executor might be more favourably dealt with (in a question with the heir) than a purchaser with a seller, or a landlord with his tenant. For a valuable discussion on the subject of what belongs to the heir, and what to the executor, you may here be referred to the case of *Dixon*.¹ It was at one time questioned, whether, apart from cases of barony, mills passed with the lands on which they are situated, as part and pertinent, without specification; or whether they were separate tenements, requiring special conveyance. *Stair* thought they required special conveyance.² But *Erskine* held that, while a mill is capable of being made a separate tenement, by actually separating it from the lands (as by a grant of it without them), yet that, wherever the mill has continued united with the lands, it must be a *quæstio voluntatis*, depending entirely on the granter's intention, which must be gathered from the circumstances of each case wherein the question occurs, whether a charter of the lands shall carry a mill situated on them or not.³ *Erskine's* doctrine received the sanction of the Court.⁴ The disposition of the lands includes all the minerals and substances in the lands (except such as are *inter regalia*).⁵ In *Burly's* case, the Court preferred a title to the lands, with parts and pertinents, as a title to the coal in the lands, in competition with a title founded on a special disposition of the coal. When the lands are bounded by a stream (not being a navigable river), the disposition will include half the *alveus* of the stream, *ex adverso* of the lands; although these lands may be only a narrow stripe, and the lands of the opposite heritor are of great breadth.⁶ But where lands adjoining a stream, but not described as bounded thereby, were taken by a railway company for the purposes of their Act, and where the conveyance to the company described the ground as consisting of a specific quantity, specially mentioned, and made reference to a plan on which that ground was delineated, the Court were of opinion that the conveyance was to be regarded as one conveying a limited and precise portion of ground, and that it did not give the railway company right to any portion of the *alveus* or channel of the stream, the same not being included in the measurements or plan.⁷ And, if there are eel-cruives constructed in such a stream, the disposition of the lands will carry the right of maintaining them;⁸ also the right of trout-fishing in such

¹ *Dixon*, 6th March 1843, 5 D. 775; affirmed 26th June 1845, 4 Bell's App. 286.

² *Stair*, ii. 3. 71.

³ *Erskine*, ii. 6. 5.

⁴ *Rose*, 17th June 1777, M. App., Part & Pertinent, No. 1.

⁵ *Craig*, ii. 7. 17; *Erskine*, ii. 6. 5; *Burly*, 30th Jan. 1662, M. 9630.

⁶ *Lord Deas* in *Menzies* (see next page).

⁷ *North British Railway Co.*, 19th Dec. 1862, 1 Macph. 200.

⁸ *Braid*, 24th Jan. 1800, M. App. Property, No. 2.

stream, *ex adverso* of the lands, but only with trout-rods, and not with net and coble, or otherwise so as to injure the salmon-fishing of another proprietor.¹ The proprietor of the salmon-fishing cannot, however, prevent the proprietor *ex adverso* from fishing trout in salmon casts.² Moreover, an opinion was expressed in Somerville's case, that there is no law to prevent those in the right of trout-fishing pertaining to one bank, from casting their lines beyond the centre of the river,—that is, beyond the line to which their right in the *solum* of the river extends. On the same principle, when an inland loch is surrounded by the lands of a private individual, it is his exclusive property, as part and pertinent of his lands, though not mentioned in his titles.³ Lord Stair further says, that where such loch is adjacent to the lands of two or more proprietors, and is not expressed in the titles of either, and has not been possessed exclusively by either for the prescriptive period, it belongs to the proprietors whose lands front thereon, as a common property.⁴ But where one party was infeft in the loch, *per expressum*, and the other in lands adjoining the loch, *cum lacu et piscationibus*, the party holding the latter general title not being able to establish uninterrupted possession, the express right (on which full possession had followed) was found to exclude him, although both rights flowed from the same author, and the general title was first in point of date.⁵ The question, in such cases, appears to depend on the possession. For in a case between Menzies of Menzies and Robertson of Strowan, decided on 2d July 1799, and noticed in the case of Menzies to be presently quoted, although Menzies had an express title to the loch, and Robertson had only the general title of lands with lochs, fishings, and pertinents, it was decided that both parties had a joint right or common property in the loch, and a joint right of sailing, fishing, etc., except that they should not draw their nets on the shores of each other's lands. It would appear also that an exclusive right may be acquired by prescriptive possession on a title to lands 'with lochs,' even where there are several proprietors of lands fronting the loch.⁶ It is also settled that one of two proprietors, having a joint right of common property in a loch, can alienate an interest or share of such common property, so as to give to a third party a common right in the loch; and that, if the title of the disponent is founded on a charter of the lands adjoining the loch, with lochs, fishings, and pertinents, a conveyance by him to his disponee of a portion of the lands fronting the loch, with all his right, title, and interest, and with lochs, fishings, and pertinents, will confer on the disponee a share of the common property of the loch.⁷ It is to be observed, however, that the introduction of the new proprietor will not be allowed to operate so as to give him and his author together a larger

¹ Carmichael, 20th Nov. 1787, M. 9645; Mackenzie, 26th May 1830, 8 Sh. 816; affirmed 14th May 1832, 6 Wil. & Sh. 31.

² Somerville, 22d Dec. 1859, 22 D. 279.

³ Stair, ii. 3. 73; Bankton, ii. 3. 12; Macdonell, 5th June 1830, 8 Sh. 881.

⁴ Stair, *ut supra*.

⁵ Scott, 22d July 1835, M. 12,771.

⁶ Baird, 2d Feb. 1836, 14 Sh. 396.

⁷ Menzies, 10th March 1854, 16 D. 827; affirmed 10th June 1856, 2 Macqueen, 463.

FLUCTUATING
BOUNDARY.

right or interest in the common property than the author himself had before the alienation to the new proprietor. This, at least, is the legal position of the question. How to carry it into practical effect may sometimes be difficult. It is also settled that the right to a loch includes not only the water but the *solum* or *alveus*.¹ It has been likewise held, in questions between private parties, that the proprietor may follow the boundary, when of a fluctuating nature, or receding, as sometimes happens in the case of the sea; and that the fluctuating line is to be presumed the boundary when the property consists of an island, or is situated on the sea-shore, or lies along the bank of a navigable river. We have a case of following the receding sea in that of Culross,² where the boundary was the sea or the sea-shore, the common highway intervening, or reserving the common highway. In that case the proprietor was found entitled to enclose and appropriate the ground down to the high-water mark. And I beg to call your attention to the distinction between this case and that of St. Monance, formerly quoted, where the boundary was the 'common passage and full sea,' or 'the full sea, the High Street intervening;' and the proprietor was held bounded by the street which lay along the high-water mark.³ In the Culross case, the terms used were 'the sea' or 'sea-shore' (not 'the full sea'), 'the highway intervening,' or the highway reserved; and the proprietor had right to the shore, or at least to all shore-ground gained from the receding sea.

SEA-SHORE.

Of the many cases illustrative of the rights in the sea-shore, or its pertinents, I shall here notice one or two.

1. It was found that a bank of shelly sand, contiguous to the sea-shore, and covered by the sea in ordinary tides, was not *inter regalia*, but a pertinent of the adjacent lands. At advising the case, the Lord-President Campbell said: 'Property of land, adjacent to a heritor's shore, is not a *regale*. Rocks, with sea-weed, and the like, are pertinents of the adjacent property without a royal grant. It was so found here, some years ago, in a question between Lord Macdonald and the Laird of M'Leod as to a multitude of rocky islands near the shores of Skye. His property has the advantage of gaining on the sea, *alluvione*, provided always he do not impede the uses of navigation, which is the single restraint of his right.'⁴ It is to be remarked, however, that the Crown was not represented in that case, which was tried between the proprietor of the lands adjoining, or near, the sand-bank, and two individuals claiming simply as members of the community. Whether the Crown would admit the right of the proprietor as broadly as here laid down, may, I think, be doubted.

2. The proprietor of a barony *de facto* bounded by the sea,—though the sea was not mentioned in the titles as his boundary,—was held to have exclusive right to the sea-ware *ex adverso* of his lands; and an averment by certain parties, that they and the public had enjoyed forty

¹ Dick, 16th Nov. 1769, M. 12,813.

² Culross, 24th Nov. 1809, Hume, 554.

³ See *ante*, p. 561.

⁴ Innes, 27th May 1807, Hume, 552.

years' possession of the sea-ware and sand along with the pursuer, but not as part and pertinent of lands bounded by or touching the sea, was found not relevant to be admitted to proof.¹

3. But the right of taking sea-ware from the shore for manuring lands is not a privilege inseparable from the property of the shore; and such a right may be acquired by prescriptive possession under a title with parts and pertinents.²

4. The proprietor of a barony, however, though bounded by the sea, and infest with fishings as well in salt as in fresh waters, if not infest in the sea-shore, has no title to prevent the public from taking limpets and other shell-fish from the rocks and shores, *ex adverso* of his lands, below the high-water mark.³

5. Neither has the proprietor of a barony with fishings right to mussel-scalps situated on the shore of the barony,—at least without forty years' exclusive possession.⁴ The question, whether exclusive possession for forty years would confer a title without an express grant, was noticed in the Duke of Argyll's case, but did not require to be considered.

6. The proprietor of lands, which were *de facto* bounded by the sea, had, at his own expense, erected landing-piers, partly below high-water mark and partly on his own lands, and not abutting on any public road. These piers had been used by steamboats and their passengers for upwards of seven years, under regulations and on payment of tolls fixed by the proprietor. Their erection did not impede navigation nor interrupt the use of the shore by the public, and the sanction of the Admiralty had been obtained for it. In these circumstances, the Court held, in a possessory question with private parties claiming right to use the piers as dedicated to the use of the public, that the piers were not to be regarded as free ports, but as private property; and they interdicted steamboat proprietors from using the piers, contrary to the regulations of the owner, for landing passengers on Sunday.⁵

By the rule already stated, proper pertinents, though not actually adjoining the lands, pass with the lands as accessories,—for example, the seat in the parish church, and the burying-ground in the church-yard.⁶ And discontinuous lands themselves may be acquired or conveyed as parts and pertinents. Erskine says that 'separate farms, or tenantries, though not formerly reputed to belong to the land conveyed, may be carried, if possessed as part and pertinent beyond the memory of man.'⁷ The same doctrine is laid down by Craig⁸ and Stair,⁹ and is supported by the case of Forsyth.¹⁰ The case of Glendonwyne appears to be to the same effect.¹¹ Moreover, immemorial possession of lands, as parts and

DISCONTIGUOUS
PERTINENTS.

¹ Saltoun, 24th Nov. 1857, 20 D. 89.

² Baird, 25th May 1859, 21 D. 848.

³ Hall, 14th Jan. 1852, 14 D. 324.

⁴ Duke of Argyll, 17th Dec. 1859, 22 D. 261.

⁵ Colquhoun, 17th June 1859, 21 D. 996.

⁶ Lithgow, 15th Jan. 1697, M. 9637; Duff, 29th June 1769, M. 9644.

⁷ Erskine, ii. 6. 3.

⁸ Craig, ii. 3. 26.

⁹ Stair, ii. 3. 73.

¹⁰ Forsyth, 1st March 1632, M. 9629.

¹¹ Glendonwyne, 5th July 1716, M. 9643.

pertinents, has been found to exclude claims founded on titles containing the lands *per expressum*, but without possession.¹

REGALIA ARE
NOT PERTI-
NENTS.

It is to be kept in view, however, that the general rule as to parts and pertinents does not apply to the case of *regalia*, which do not pass without express grant from the Crown. There are two classes of *regalia*: the *majora* and *minora*; the former, comprehending the Sovereign's inherent right of superiority, are not communicable to subjects; the latter are those comprehending forests, salmon-fishings, gold and silver mines, navigable rivers, ports, highways, ferries, sea-greens, and shores.² All the *regalia* of this latter sort, except navigable rivers and highways, may become private property by express grant from the Crown, or by prescription. That with which we meet most frequently in practice is the right of salmon-fishing. At an early period, it was thought that the right of salmon-fishing was not *inter regalia*, except where the sea filled, or salt water came, or where the fishing was with a coble or a trail-net; and that, under other circumstances, it passed with a clause *cum piscationibus*.³ But this view has since been rejected by the Court.⁴ And it is now settled that the Crown has right to the salmon-fishing in the open sea around the whole coast of the kingdom, unless parted with by grant; and that such right is not merely a right of fishing for salmon, as an attribute of sovereignty, but a right to the 'salmon-fishings around the sea-coast of the kingdom,' and a *patrimonium*,—a beneficial interest, constituting part of the regal hereditary property. The whole space of the sea within cannon-shot of the coast is said to be considered as making a part of the territory.⁵ In a recent case, the space was spoken of as held to go as far as three miles from the shore.⁶ The space must now be held as in point of fact extending much beyond three miles; but whether the right of salmon-fishing will be held as proportionally extended, is of course a separate question.

SALMON-
FISHING.

It is decided, however, that a title to lands, *cum piscariis*, or *cum piscationibus*, accompanied by the exercise of the right of salmon-fishing, in a manner agreeable to law, during the prescriptive period, will be interpreted to mean a grant of salmon-fishings.⁷ But, in order to support the plea of possession, the exercise of the right must be in a manner allowed by law;⁸ and the mere use of rod and spear, or, where the use of net and coble is practicable, any possession more slender, is insufficient to give to a conveyance, which is expressed simply *cum piscationibus*, the import of a grant of salmon-fishings.⁹ If, however, fishing by net

¹ Countess of Moray, 20th Feb. 1675, M. 9636; Magistrates of Perth, 19th Nov. 1829, 8 Sh. 82; Earl of Fife's Trustees, 16th Jan. 1830, 8 Sh. 326.

² Erskine, ii. 6. 13.

³ See two decisions to that effect in M. 14,249.

⁴ Duke of Sutherland, 11th June 1836, 14 Sh. 960.

⁵ Vattel's Law of Nations, i. 23. 289.

⁶ Gammell, 6th March 1851, 13 D. 854; affirmed 28th March 1859, 3 Macq. 419.

⁷ Craig, ii. 8. 15; Stair, ii. 3. 69; Erskine, ii. 6. 15; Forbes, 3d Dec. 1701, M. 14,250; Duke of Queensberry, August 1773, M. 14,251.

⁸ Mackenzie, 12th June 1840, 2 D. 1078.

⁹ Duke of Sutherland, *supra*; Milne, 23d Nov. 1850, 13 D. 112.

and coble—the acknowledged legal mode—is impossible, the exercise of the right—the full possession—by other legal means adequate to the highest use of the subject, is sufficient possession. Fishing in the Tweed by cairn-nets adjoining the banks of the river, and which at one time might lawfully be used by the Tweed Acts, was held full possession to support prescription.¹ Cairn-nets are now prohibited. The right of salmon-fishing has itself its accessories, on the principle that the grant of any right carries with it whatever is requisite on the granter's part for the fair use and enjoyment of it. Thus, a right of fishing in a river implies the right of using the banks for drawing nets, and for access, but in the way least oppressive to the heritor of the lands.² And, on the same principle, the right to a navigable canal, through a property, implies the right to a towing-path along the banks as a necessary appendage to it.³ But the practical rule to be observed in making out a grant of salmon-fishings is, to mention them expressly, and with them, or any servitude of canal or otherwise, to arrange and detail all the accessories.

We find an instance of the acquisition of another of the *regalia* FERRIES. *minora*, by prescriptive possession upon the title of a barony with part and pertinent, in the case of the Duke of Montrose,⁴ where a right of ferry over a navigable inland lake was found to have been so acquired.

We meet also with grants from the Crown of royal forests and of the FORESTS. office of keeper or forester within their bounds. Forests Lord Stair defines as places 'destinate for deer for the King's use and pleasure in ' hunting, which cannot be extended generally to woods, but only to such ' where deer have been kept.' 'Forests for keeping deer,' he adds, 'remain *inter regalia*, though the wood should fail.'⁵ But the proprietor of a royal forest, and of the office of forester within its bounds, is not entitled to go upon the land of a neighbouring proprietor in pursuit of, and in order to drive back, deer that have strayed from the forest, or to prevent the neighbouring proprietor from shooting deer within his own march.⁶

As regards gold and silver mines, the Crown is bound to make grants GOLD AND SILVER MINES. to the proprietors of the lands in which they are found, subject to a lordship of one-tenth of the find.⁷

The teinds of lands—that is, the portion of the produce formerly set TEINDS. apart to the church, and now belonging to those in right of the church, subject to the burden of ministers' stipends—do not pass with the lands as part and pertinent. They are a separate estate, and require special title.

The description of lands usually closes with a statement of the parish SPECIFICATION OF PARISH AND COUNTY. and county within which the lands lie. The county and parish, or sup-

¹ Ramsay, 9th Feb. 1848, 10 D. 661; affirmed 3d Aug. 1850, 7 Bell's App. 248.

² Miller, 22d Nov. 1825, 4 Sh. 214.

³ Swan's Trustees, 1st Feb. 1850, 12 D. 622.

⁴ Duke of Montrose, 10th March 1848, 10 D. 896.

⁵ Stair, ii. 3. 67.

⁶ Duke of Atholl, 28th Feb. 1862, 24 D. 673.

⁷ Act 12 James VI. 5th June 1592, *unprinted*; Earl of Hopetoun, 12th Jan. 1750, noticed in Brodie's Stair, p. 276, note d.

posed parish, must be named in descriptions framed in accordance with the Titles to Land Act of 1858;¹ and the county must be named in descriptions framed in accordance with the Titles to Land Act of 1860.²

In dispositions which transfer existing feudal estates, there is then added the clause, 'together with all right, title, and interest which I, or 'my authors or predecessors, or heirs or successors, have, had, or can 'claim, or pretend, to the lands and others before disposed.' This clause is not usual in the original charter, but it is not out of place in it. Of course, when inserted, it will convey only all right, title, and interest consistent with the grant of a sub-feu. This clause is of special importance in the case of gratuitous conveyances granted without absolute warrandice, but in which it is intended to convey to the disponee not only the lands, but likewise every subordinate or supervening right in the lands which the disposer had or might acquire. In the case of onerous conveyances with absolute warrandice, the clause in question, though it ought not to be omitted, would not be required in order to make the conveyance embrace every such subordinate or supervening right. These points are touched on at considerable length in a case as to the effect of the conveyance of lands in security, in the form authorized by the Heritable Securities Act of 1847, and particularly the non-insertion in such conveyance of the express clause, 'together with all right,' etc.³

CHAPTER III.

QUALIFICATIONS OF THE DISPOSITIVE CLAUSE.

WHERE there are reservations, or limitations, or qualifications of any kind, in favour of either the granter or grantee of the charter, the appropriate clauses ought to be introduced as part of the dispositive clause of the charter. And I now proceed to notice the principal limitations and qualifications usually met with in practice in connexion with feus. They may be classed under two leading heads; viz., (1.) Those which limit or qualify the right of property in the vassal, and enlarge, in a corresponding degree, the rights or privileges of the superior; including those which give the superior the opportunity of regulating amenity, or the like. (2.) Those which limit or qualify the superior's ordinary casualties, and correspondingly enhance the value of the estate in the vassal.

LIMITATIONS OF VASSAL'S RIGHTS. RESERVATION OF MINERALS.

Of those of the first class, the most important are reservations to the superior of mines, minerals, and other substances, distinct from the surface of the ground. And here I have to remind you that, such a reservation being contrary to the general rule which gives to the vassal every part

¹ Titles to Land Act of 1858, ss. 15 & 16.

² Do., 1860, s. 34.

³ Love, 6th November 1863, 2 Macph. 22.

of the subject, *a celo ad centrum*, which is not specially reserved; it is necessary, in framing the clause, to be distinct and explicit in expressing all that is to be reserved. Thus, it was held that the reservation, by the superior, of 'mines and minerals, of whatever nature and quality,' did not include a quarry of stone, though of a rare species, peculiarly fitted for architectural purposes.¹ Again, a reservation of 'coal and other metals, fossils, and minerals,' does not include a freestone quarry.² The reservation of 'stone quarries and coal,' and of right 'to win coals and stones,' does not include 'blackband ironstone.'³ And the reservation of the 'property of the whole coal, and liberty to work,' etc., 'and to set down sinks, make aqueducts,' and to do 'every other thing necessary thereanent,' on payment of surface damages, does not give right to quarry stones for making a new road from one of the coal-works for transporting the reserved coal.⁴ The reservation ought to have annexed to it express power to the superior to search for and win and work the reserved substances, on payment of surface and other damages to be done in the exercise of the power. In the case of *Menzies*, already cited, the Lord Chancellor Eldon, speaking of a lease without power to the proprietor to work minerals, said that, if such power was not reserved in the lease, the proprietor could not enter and enjoy without the tenant's permission. This is contrary to a judgment of the Court of Session, where the proprietor was found entitled to search for coal in lands let, upon satisfying the tenant for the damage done, although the lease contained no stipulation to that effect in favour of the landlord.⁵ I have not found any authority on the same point in connexion with such reservations in feu-rights. On the principle which we found applicable to grants of salmon-fishings, and of navigable canals,—viz., that the grant carried with it, as an accessory, whatever was really necessary for its *bond fide* enjoyment,—giving with the salmon-fishing the right to draw nets, and with the navigable canal the right of towing-path,—it would seem that the reserved right of minerals should carry with it, as an accessory, the power to enter on the vassal's lands, in order to search for and win the reserved minerals, on payment of damages, at least if the superior could not otherwise obtain access to the minerals; but, nevertheless, it would be a professional blunder to omit the special reservation of the power to work the reserved minerals. On the other hand, if there is power to search for and win and work the minerals, the question arises whether the superior is bound to compensate damages arising by his operations, supposing there is no express obligation on him to do so. It was found in one case, that the superior was so bound, notwithstanding the absence of express stipulation.⁶ But the Court had at first decided that damages were not due; and, though

¹ *Menzies*, 10th June 1818, F. C.; affirmed 17th July 1822, 1 Sh. App. 225.

² *Duke of Hamilton*, 29th June 1841, 3 D. 1121.

³ *Forth & Clyde Navigation Co.*, 21st Nov. 1848, 11 D. 122.

⁴ *Harrowar's Trustees*, 6th Feb. 1827, 5 Sh. 307.

⁵ *Smith*, 21st June 1768, M. 15,266.

⁶ *Duke of Argyll*, 21st Nov. 1788, M. 6573.

the grounds on which their judgment came to be different are not stated, there is reason, from the report, to think that the use and wont applicable to the particular case influenced the decision, and that the case does not settle the general point. The superior, however, is not bound, without express stipulation, to insert a special clause, containing obligation to support the roof of his coal, or other mines, in the event of his working the reserved minerals; or to pay damages in the event of his failing to support it.¹ The interlocutor to this effect was pronounced without prejudice to the vassal's pleas at Common Law, in case of damages arising, and of the superior's answers thereto; and this special finding appears to have been confirmed by the Inner House. But two of the Judges in delivering their opinions objected to it. The general rule to be observed in practice as to these points, therefore, is, that the reservation of the minerals or other substances should have annexed to it full power to search for and win the reserved substances, and an obligation on the superior to pay surface and other damages; and in that case it would be well to add, 'as such damages shall be ascertained by two referees mutually chosen, or by an oversman to be named by them, or by the parties, in case the referees shall differ in opinion.'

You will find a good and pretty ample clause of reservation with its adjuncts in Duff's Feudal Conveyancing.² But Mr. Duff does not specify ironstone; and perhaps the word 'substances' would be more comprehensive than any of the general words he uses. Such clause, however, is inconsistent with the enjoyment of an ordinary villa-feu; and it should either be left out of the charter of such feu, or, if inserted, should be so qualified as to prevent either injury to houses, or to the amenity of the place. The minerals, when reserved by the superior, are held by him under the same title by which he holds the superiority. He can dispose of them along with the superiority, or separately, at his pleasure; or, on selling the superiority, he can retain the minerals to himself, just as he has done when selling the property. If, however, he does not expressly retain them, they will be comprehended under a disposition of the superiority, conceived in the appropriate and usual terms. Where, therefore, a superior possessed of reserved minerals is about to sell the superiority, it is necessary to ascertain whether the sale is to include the minerals, and to reserve them expressly if not.

Amongst the qualifications or limitations found in feu-charters, besides the reservation of minerals and other substances, I notice *first*, The clause of pre-emption in favour of the superior, being a provision, that the vassal, in case he shall sell the lands, shall first offer them to the superior at the price proposed to be given by another. This clause was common in old times, but is not very frequently met with in modern charters. *Second*, The prohibition against subinfeudation, and against selling or disposing the lands to be held of the vassal himself, or of any other interjected superior, but only to be held of the granter of the

Steuart, 17th July 1857, 19 D. 1071.

² Duff's Feudal Conveyancing, p. 70.

charter as superior. And *third*, In charters, especially of town-feus, we find a variety of conditions and obligations intended for the regulation of the mutual interests of the feuars, the erection and maintenance of houses, the preservation of amenity, the making and upholding of streets, pavements, drains, etc.

1. In reference to the first of these provisions (the clause of pre-emption), it has been questioned whether the Act of Geo. II., abolishing all clauses '*de non alienando sine consensu superioris*,' and giving every vassal the free right of selling his feu,¹ did not include the abolition of an ordinary clause of pre-emption. And it has not yet been expressly settled that the clause is not abolished by that Act. In a case to be presently noticed, Lord Corehouse said, 'It is not yet fixed in our law whether that clause falls under the Statute of Geo. II., which prohibits the superior to stipulate that lands shall not be sold without his consent.'² But there are two cases which would appear to imply that the clause is not struck at by the Act.³ In the Earl of Mar's case, the Lord Ordinary said, 'No objection is here taken to the clause of pre-emption; and, considering the result of the case of Preston, it would be difficult to hold that such a clause was absolutely illegal.' And the opinion of professional men I understand to be, that an ordinary clause of pre-emption, giving the superior right to purchase at the same full price that would be given by another, is a legitimate stipulation not struck at by the Act.

CLAUSE OF
PRE-EMPTION.

2. It was at one time questioned also, whether the prohibition against subinfeudation was a legal stipulation with reference to the Act of Geo. II. That prohibition is not, however, properly speaking, a restriction of the power of alienation, nor is it intended to operate as such. It leaves the vassal perfectly free to substitute a new vassal in his full place and stead. The object of the prohibition is the protection and enforcement of the superior's casualties arising on the sale or transfer of the feu to a stranger or singular successor, and the better securing and enforcing regulations as to buildings, amenity, etc. In one case, the consulted Judges, either expressly or by implication, held such a clause to be lawful, and not struck at by the Act.⁴ The same opinion will be found in Bell's Commentaries.⁵ The clause, moreover, has been recognised in many decisions and Conveyancing Acts, and, as it is in universal use, its legality is beyond all question.

PROHIBITION
AGAINST SUB-
INFEUDATION.

3. Stipulations for the erection of houses, preservation of amenity, etc., are perfectly legal, if not simply vexatious, and as far as the superior has an interest to enforce them. And the question we have to consider is, in what way are these stipulations, and the clause of pre-emption and prohibition against subinfeudation, or any similar clauses, to be made fully

STIPULATIONS
FOR ERECTION
OF HOUSES, ETC.
HOW ARE
CLAUSES OF PRE-
EMPTION, ETC.,
TO BE MADE
EFFECTUAL.

¹ 20 Geo. II. c. 50.

² Coutts' case, *infra*.

³ Preston, 6th March 1805, M. App. Personal and Real, No. 2; 3 Ross's L. C.

289; Earl of Mar, 28th Nov. 1838, 1 D. 116.

⁴ Campbell, 4th March 1828, 6 Sh. 679.

⁵ Bell's Comm. i. 27, 29.

effectual? In what way is the superior to secure that the conditions and obligations in question shall affect not merely the original vassal and his heirs, but, and more especially, shall attach to the subjects themselves, and thereby to singular successors acquiring right;—in short, that the conditions and obligations shall be permanently binding and effectual against the subjects, and the proprietor thereof, whosoever he may be? For these purposes, it had long been usual to declare the conditions, etc., to be real burdens upon the lands disposed, and to fence or protect them by irritant clauses,—that is, clauses declaring that, in case of failure to fulfil the conditions, etc., or of doing acts contrary to such conditions, the charter should be null and void. To these were sometimes added resolute clauses,—that is, clauses declaring failure to fulfil the conditions, or acts contrary thereto, to cause the forfeiture of the vassal's right. And all these conditions, including the clauses irritant and resolute, were required to be *verbatim* inserted in the feudalizing sasine of the new feu, and also repeated in every successive investiture of the lands.

The legality of such conditions, or some of them, and the mode of rendering them effectual, and, it may be said, generally the whole of this subject, came before the Court in the case usually called 'Coutts' case.'¹ The Court were there required by the House of Lords to give their opinion on the following points: *First*, Were there any burdens (except of course feu and blench duties) that can be made to qualify the fee in the hands of a singular successor, although not declared in terms to be real burdens? *Secondly*, Were stipulations (not proper money obligations), whether positive or negative, to do, or refrain from doing, certain things, having relation to the subject, capable of being made real, so as to affect singular successors, with or without an irritancy? *Thirdly*, Did an irritancy, in any instance, supply the place of express declaration that a stipulation is intended to be made real, so as to make it effectual without such declaration? And *lastly*, Was it essential to the effect of an irritancy, that it bear a declaration resolute of the right of the vassal or disponent, as well as of the disponent,—that the clause, in short, contain both irritant and resolute words? These questions were answered to this effect: (1.) That there are no *voces signatæ*, or technical form of words, essentially requiring to be employed in order to constitute a real burden. It is sufficient that the intention of the parties be clearly expressed, and there is no need to use such words as 'that the obligation is real,' or 'that it is a *debitum fundi*;' or to stipulate 'that it shall be inserted in the infeftments, or attach to singular successors.' But the terms employed must clearly express, or plainly imply, that the subject itself is to be affected, and not the grantee and his heirs alone. And the burdens or conditions must be inserted in the sasine, and appear in the Register of Sasines. Moreover, the burden or condition must not be contrary to law,

¹ Incorporation of Tailors of Aberdeen v. Coutts, 20th December 1834, 13 Sh. 226; remitted for opinion 23d May 1837,

2 Sh. & M'L. App. 609; Court's opinion confirmed, 3d August 1840, 1 Robinson's App. 296.

or inconsistent with the nature of the property. It must not be contrary to public policy, by making land unmarketable or creating a monopoly. It must not be useless or vexatious; and there must be a party having an interest to enforce it. If a sum of money is the burden, its amount must, in the general case, be specified. For example, in the charter of a house situated in an enclosed square in a town, which charter was granted after walls and railing had been put up, to enclose the garden of the square, an obligation, even though imposed in terms on the subjects, to pay generally a proportion of the expense of erection of the walls and railing (already put up), will not be binding on a singular successor. But, if the enclosing has not taken place, an obligation imposed on the subjects, and not merely on the proprietor, to enclose and to pay proportionally with other subjects and proprietors, will affect the subjects and singular successors therein; as will also, in either of these cases, an obligation so imposed to keep the square and enclosing walls and railing in repair, or the like, in time to come. Obligations of the first class are simply for payment of money undefined in amount, which the law does not admit as a burden on land. Those of the second class are for the performance of specific facts having a natural connexion with the subject, which are allowed by law. Moreover, the former prestations consist respectively of single acts which can be performed once for all. The latter prestations are necessarily continuous, involving permanent endurance; and it is thus implied that they shall affect the subjects.

(2.) Stipulations and conditions, to do things having a natural and proper connexion with the subject of the grant, may be made essential conditions of the right, though not declared real burdens, and will affect singular successors without the aid of an irritant clause. Such is a condition by a superior (not expressly declared a real burden), that his vassals should build houses on the feu, and maintain and uphold such houses when built; and in a case subsequent to that of Coutts, where, besides such obligation to build, maintain, and uphold, it was added, that the vassal should keep the houses constantly insured against loss by fire to a specified extent, and regularly pay the premiums, a singular successor who had insured and recovered under his policy, on the occasion of a fire, more than the amount stipulated by the superior, was found bound to rebuild what had been consumed *damno fatali*, not merely to employ the stipulated sum in repairing the houses.¹ On the same footing are stipulations that the vassal shall abstain from acts which, in their nature, constitute a nuisance, such as tanning leather, refining tallow, making candles, or slaughtering cattle. (3.) An irritancy IRRITANCY. has no effect in making a condition a real burden, its proper object and purpose being to give a more speedy remedy to the superior in feudal subjects, or the disposer of burgage lands, by annulling the right of the party contravening the condition. An irritancy is not made stronger by stating that it shall take effect without declarator. *Lastly*, An irritancy

¹ Clark, 20th June 1850, 12 D. 1047; reversed 8th Aug. 1854, 1 Macq. App. 668.

does not require, for its operation, any resolute words, such as are essential in the strict entail.¹

From these views you will see that, as a general rule, the conditions ought, as far as the case admits, to be made burdens on the lands. No particular words are essential for that purpose, but only that the intention of parties be clearly expressed; but it is usual and proper to employ words expressly declaring the conditions, etc., to be real and preferable burdens upon and affecting the lands. The use of such words will make the intention of parties clear and beyond dispute. The condition must also appear in the Register of Sasines. Lord Stair, speaking of the clause of pre-emption, and another clause now abolished, says, 'Those limited prohibitions resolve but in interdictions, and, being contained in the sasines 'registrate, they are equivalent to interdictions, published and registrate.' The importance of this is brought out strongly in Lord Corehouse's opinion in Coutts' case, and particularly in his remarks on the case of Stirling.² In this last case, there was a clause of pre-emption; but the clause was not incorporated in the investiture. A sale was made, without previous offer to the superior, which Lord Kames annulled, because the purchaser had private knowledge of the clause, and so was *in mala fide*. To this it had been answered that, though he knew of the clause, he knew also that, not being in the infestment, it was not effectual against a singular successor. The Court altered the Lord Ordinary's interlocutor, and supported the right of the purchaser. Lord Corehouse, commenting on the decision, regarded it as resting on 'clear and unanswerable ground,' inasmuch as the condition was not in the investiture, which was the only legal certification to the purchaser.

REGISTRATION OF CONDITIONS.

As regards the mode of accomplishing the registration of the condition in the Register of Sasines, the best course is to stipulate that the charter shall be recorded by the grantee within a short limited period, and shall not be assignable to a third party, or available as the warrant of any notarial or other instrument. The better to secure due registration, the superior not unfrequently stipulates that his own agent shall act as agent of the disponee, and as such shall sign the warrant, and complete the registration of the charter, of course at the disponee's expense. This is not necessary for accomplishing the superior's purpose, and appears an objectionable provision, as being an undue encroachment on the province of the vassal's agent, and as a cause of additional expense to the vassal. Registration being duly accomplished, all lawful conditions will be made real burdens on the lands; and, as already seen, it is not essential that there be an irritancy of the vassal's right in case of failure to fulfil the conditions. Lord Corehouse says, 'It may be considered as undoubted law, that if a condition in a feudal grant is conceived in terms to make it real, and is not objectionable on any other ground, no irritant clause is necessary to give it effect against

¹ Coutts' case; Napier, 31st May 1831, 9 Sh. 655.

² Stirling, 29th Dec. 1756, M. 2342 5 Br. Sup. 323.

'singular successors. If it is clearly personal, or exposed to objections, 'an irritant clause will not support it.'

But, though an irritancy will not, by itself, make the condition a **IRRITANCY**. real burden, it may be of essential value by preventing a real right from being obtained or transmitted, otherwise than subject to the condition. If the charter is not to be registered by the superior's agent, and is to be assignable, it ought to appoint the conditions, and declaration of real burden, to be engrossed in any notarial or other instrument of which it may become a warrant; and, in any case, it ought to appoint these clauses to be engrossed, or validly referred to in the subsequent transmissions of the lands, under pain of nullity in case of omission. If there is no such irritancy, and if a real right is obtained which does not import the conditions into the Register of Sasines, the conditions will not be made real. If such a result takes place, a real right in the lands will be obtained free of the conditions. Third parties will be entitled to deal with the vassal as having an unqualified title. Whereas, if there is an irritant clause, and even though the same be not imported into the Register of Sasines, any notarial or other instrument which omits the conditions, and any deed of transmission which does not repeat, or duly refer to them, will be liable to be found null in a declarator; and the feuar will have only a personal right, subject to all the conditions expressed in it, or the disponent will lose all right, as the case may be, that is, according as the irritant clause has irritated both the disponent's and disponent's rights, or only the disponent's. The effect of confining the feuar to a personal right will be presently more particularly referred to.

There ought further to be an irritancy, declaring all acts in contravention of any of the conditions to be null. Such clause, however, would require to be imported into the register of sasines. Being so, it would operate full protection to the superior. Lord Corehouse says that with such clause an irritancy could be purged only before decree of declarator of irritancy was obtained. After decree, the feuar's right would be irrevocably gone. And he adds that, though an irritancy will not make real an obligation in its own nature personal, it may afford the means of construing a condition, the import of which would otherwise be doubtful. If the superior fences a condition with an irritancy, it is to be presumed that he meant it to apply in perpetuity, in the case of singular successors as well as heirs.

The superior, however, will be protected, if the feuar has only a **CONDITION OF PERSONAL RIGHT**. personal right, and if the condition is incorporated in, or made a burden on, such personal right. Until the feuar's right is made real, the only title he has is the charter containing, or burdened with, the condition. No one can take the lands from him, except by means of such title. The lands can be obtained through it, and not otherwise, and therefore subject to all its qualifications.

This is illustrated by the case of Preston, before referred to, which had reference to the efficacy of a personal obligation in favour of the

superior, to give him the right of pre-emption of certain lands. The lands had been feued to a vassal who was infekt, and had died. They were thus in non-entry. The deceased vassal had disposed the lands to a third party, for whom, apparently, he had held the lands as his trustee; but the disponent was not infekt. The clause of pre-emption was not contained in any of the titles of the lands. It was granted in a separate obligation, or back-bond, by the original vassal's disponent, the real beneficiary in the right to the lands; and that disponent had died, and his estate was in the hands of creditors to be judicially sold. There was thus no one in a situation at once to take an entry from the superior, and make up a real right to the lands. In a previous stage of the case, the Court had found that the personal obligation as to pre-emption, already referred to, ought to be inserted in the subsequent titles and investitures; and, moreover, the lands had fallen into the superior's hands by the decease of his original vassal, and in virtue of a decree of non-entry. In these somewhat complicated circumstances, the finding of the Court was, that the original vassal's disponent, the real beneficiary, who granted the 'back-bond—that is, the personal obligation before referred to—in favour of the superior, had only a personal right to the lands, 'which never was completed by infektment; that the personal right 'remained qualified by the condition in the said back-bond in favour of 'the superior; and that the adjudication, led by the creditors of the 'vassal's disponent, can only attach the said personal right, subject to 'the said condition.'

This case, you will observe, was decided on the specialty, or exception, arising from the character of the proprietor's right to the lands as being personal only. A further protection arises to the superior in consequence of the feudal relation between him and the vassal. The superior is entitled to have a vassal as well as to have the conditions of the feu fulfilled. Supposing these conditions to be contravened, the superior can refuse to grant an entry to the vassal's heirs or singular successors; and being entitled, when he has no vassal, to take actual possession of the lands, he can proceed by action of reduction-improbation, and declarator of non-entry, and thereby reduce all the titles of the feu, and enter into possession. This remedy is recommended in cases where there has been a contravention of the feudal contract,—in Bell's Commentaries,¹ by Erskine,² and likewise by Lord Corehouse in Coutts' case.

But I may here notice that this remedy is not, and cannot be made, available in reference to burgage lands held by private parties. The disponent of these lands, if a private party, and not the corporation of the burgh, cannot constitute the relation of superior and vassal between himself and his disponent. The lands must be disposed to be holden of the Crown; and the disponent has no right to grant or withhold future entries. He could no doubt enforce his right, if duly made real, in a

¹ Bell's Comm. i. 27-29

² Erskine, ii. 3. 13.

declarator or other action ; but that is not so effective as the declarator of non-entry.

These appear to be the general principles applicable to the mode of constructing and rendering effectual the clauses we are now dealing with ; but such of these clauses as operate restraints upon the natural rights of the proprietor are liable to be very strictly construed, and ought, therefore, to be framed with nice accuracy. This will appear from the Earl of Mar's case.¹ The original vassal or feuar had a charter with a clause prohibiting him and his heirs and successors from selling without making the first offer to the superior, and declaring all sales, etc., made by the vassal, without such previous offer, to be void. The vassal sold, by auction, with the superior's consent. The purchaser, without being infeft, and consequently when not a vassal in the strict sense of the word, re-sold, without having first made offer to the superior ; and it was held that, as the clause was directed against the 'vassal,' the purchaser, who had never become vassal, was not bound by it. The re-sale, therefore, made by such purchaser, though without previous offer to the superior, was sustained. But this case, at the same time, shows that the utmost precision of expression is necessary to make such a provision affect every proprietor of the lands. The irritancy was directed against sales by the vassal ; and, at advising the case, Lords Mackenzie and Corehouse expressed doubt whether the clause was applicable to any one except the original vassal, and whether its operation could in any view be extended to successive vassals.

To conclude the subject of this clause of pre-emption, I may here notice that, when it occurs, and is to be acted on, there is no difficulty in giving effect to it, if the sale is by private bargain. The price being agreed on, the seller ought to intimate the particulars, and offer to sell on the same terms to the superior, if he inclines to purchase. The superior's reply will settle the matter.

IMPLEMENT OF
CLAUSE OF
PRE-EMPTION.

If the sale is by auction, the superior's rights, if not waived, ought to be referred to in the articles of roup, and a condition inserted that the sale is subject to an offer to be made to the superior to take the lands at the price and on the terms offered by the highest bidder. Immediately after the roup, the offer will be made to the superior, whose answer will, as in the case of private sale, settle the matter. But it may often happen that the superior has no wish to purchase ; and, as a condition in his favour in the articles of roup may deter others from coming forward, and thus injure the sale, it is well to ascertain beforehand whether he is to insist in his right of pre-emption or to waive it, so that, if he waives, the sale may go on as in an ordinary case.

The prohibition to subfeu is usually accompanied by an irritant clause, annulling deeds and instruments in which the prohibition is not inserted, and also deeds done in contravention of the prohibition. But, if published on the record, it will be binding on singular successors, with-

¹ Earl of Mar, 28th Nov. 1838, 1 D. 116.

out the irritancy, and, as in the case of the clause of pre-emption, the superior's remedy, in case of contravention, is to refuse to grant an entry to the heirs of the contravening vassal.¹

CONDITION AS
TO ENTRY OF
DISPONEES.

Connected with the prohibition to subfeu, there is frequently introduced a condition that the disponees of the vassal shall enter as vassals with the superior, and pay composition, within a fixed period after the date of the conveyance in their favour. To the effect of enabling the superior to enforce the pecuniary stipulations, it follows, from the opinions of the Judges in the case of Coutts, that the prohibition is valid, and (after a breach) can be made operative by refusal to give an entry to a disponee acquiring from the contravening vassal, or to the heirs of such vassal. Nor does it seem to admit of a doubt that a clause of irritancy would, for the same object, be enforced by the Court. Beyond this, it would probably be held that the superior has no interest, and consequently no title, to enforce such an irritancy. The result seems thus to be that a prohibition to subfeu, though validly made real, would not be extended against a conveyance in ordinary form containing an obligation to infest by two manners of holding, the one, of the granter's superior (which is consistent with the prohibition), and the other, of the granter himself (which is inconsistent with it), so as to enable a superior to maintain that the terms of such conveyance were a positive breach of the condition and ground of forfeiture of the feu; such prohibition would only authorize the superior to enforce an entry and payment of the stipulated composition. The conveyance, in such case, would be held, *quoad* the superior, as containing only an obligation to infest to be holden of the superior in terms of the feu-right. I think the superior's rights, in this particular, would go no further than as here stated, because conveyances with the double manner of holding are not intended to create subfeus, but, on the contrary, to be confirmed by the superior when the proper time to obtain confirmation comes.

When the prohibition to subfeu is accompanied by an irritancy, it is not safe, and certainly not usual, to rely on a disposition with double manner of holding, and sasine thereon. In such case the purchaser should always enter with the superior. And, even if there is no irritancy, yet if the condition has been made real, it appears unsafe to rest upon a conveyance, though containing double manner of holding, and registered or completed by infestment, without obtaining the superior's confirmation. The only ground on which such a title can be secure in itself is that it constitutes a fee holden of the disponer. As it is intended to be confirmed by the superior, so as to evacuate that fee, which is a subfeu, the superior himself appears to have no interest in objecting to the title, simply because it contains the alternative manner of holding, and is not confirmed; but supposing the last vassal fraudulently to grant a second conveyance to a third party dealing with him *in bonâ fide*, or to grant a heritable bond, and supposing the second disponee or the credi-

¹ Lord Corehouse in Coutts' case.

tor to obtain a charter from the superior, I do not see how, in a question with such third party, the first disponent could found upon his title, with double manner of holding, to any effect, or could complete his title and exclude such third party. His right, as a holding of the disponent, is a subfeu, which is prohibited; as a holding of the superior, it is valueless until confirmed; and the superior, if he has granted confirmation of an absolute disposition, cannot grant a second confirmation of a right of the same nature; and, if he has granted confirmation of a limited right in security, his second confirmation can only be granted under the burden or exception of the first. It is proper, therefore, that, in all cases where the prohibition to subfeu is made a real condition of the feu, confirmation be obtained by every disponent from the superior. A provision intended for the protection of purchasers, in connexion with the prohibition to subfeu, is inserted in the Titles Act of 1860.¹ But it is liable to be defeated in the case of second sales to *bond fide* purchasers, as shall be afterwards explained.

In Coutts' case it was shown to be necessary that there should be an interest in the superior to enforce a restriction; and it has been found that a prohibition against 'digging stones, or using the ground in any other way than by the ordinary labour of plough and spade,' is inept, as against a singular successor.²

Not only must the superior have an interest, but the condition must not be such as to create a monopoly. In some feu-rights it is provided that not only all future charters, but all deeds of transmission by vassals, with the sasines thereon, shall be prepared by the superior's agent. A condition to this effect was at first sustained here;³ but on appeal to the House of Lords the case was remitted for consideration;⁴ and the superior's claim was abandoned.⁵ Such clauses, of which examples are still to be met with, appear objectionable in principle. An endeavour has been made to show that the superior's interests derived protection from having the deeds of transmission prepared by his own agent; but every legitimate interest of the superior can be protected by properly framing the charter, and securing that the same is duly recorded by, or on behalf of, the original grantee, and that in subsequent transmissions the conditions are duly engrossed or validly referred to. The nature of the provisions to be introduced in the charter, for accomplishing these objects, has been already considered. But, in town or villa feus especially, further protection may arise to the superior by making entry-money due in all cases at stated intervals, from eighteen to twenty-five years each, and without reference to the occurrence of deaths, sales, or transfers. In such cases the entry-money should be expressly declared a real burden on the lands; or it may be provided that the entry-money shall be exigible simply on account of the succession of an heir, or the transfer to a pur-

¹ Titles Act of 1860, s. 36.

² Heriot's Hospital, 30th July 1773, M. 12,817; affirmed 3d March 1774.

³ Campbell, 28th May 1823, 2 Sh. 341.

⁴ 29th June 1825, 1 Wil. & Sh. 690.

⁵ 4th March 1828, 6 Sh. 679.

chaser or disponee, and without reference to the question whether the lands are or are not in non-entry, and whether the case is one of the transmission of a real or of a personal right. This appears to be an excellent provision, because it is complete, and because it raises no agents' question. It affects the patrimonial rights of the superior and vassal, but in a perfectly legitimate way, as it only secures to the superior what he is entitled to by the constitution of the feudal contract.

**LIMITATIONS
OF SUPERIOR'S
RIGHTS.**

I now pass to the consideration of the second branch or class of conditions in the original charter; viz., those which modify the legal rights of the superior;—and the mode of making the same effectual against singular successors in the superiority.

**CASUALTIES
OF SUPERIO-
RITY.**

It will be convenient to state, in the first place, what are the ordinary legal rights here referred to; in other words, to explain what are the subsisting incidental rights or casualties attached to an estate, or fee, of superiority.

The subsisting casualties of superiority are—

NON-ENTRY.

1. *Non-Entry*.—It is a fundamental principle of the feudal system, that every superior is entitled to have a vassal entered in the feu. This is, no doubt, directly traceable to the ward-holding, where the condition of the grant was military service, which required the existence of a vassal capable of performing the service, and which gave the land or its fruits to the superior during the vassal's nonage. For early times, we may refer to the *Consuetudines Feudorum*, which is the common institute of the feudal law, and is known also as the Book of the Feus. It will be found at the end of the *Corpus Juris*. We there learn that, if the heir of the vassal neglected to enter with the superior for year and day, his right was *eo ipso* forfeited; the lands he was entitled to hold reverting to the superior in permanent right.¹ The superior is still entitled, in strict law, to take possession of the lands, to the exclusion even of tenants holding leases, and of sub-vassals, creditors, and all others, however complete their rights, if the heir, after being cited to enter by a regular process, shall without cause fail to do so; or, in feudal language, if he is contumacious. In the exclusive nature of this right you will see a resemblance to the right of the superior to the possession of ward-lands during the heir's minority, to the exclusion of creditors and others, to whose rights he had not been made a party. But cases in which the superior's extreme right, in virtue of non-entry, comes into operation, are now almost unknown. The claim, in its severity, is regarded as odious; and any reasonable grounds on the part of the heir for his delay in entering, and in satisfying the superior's right to have a vassal, will exclude the extreme claim even after citation.² In practice, the casualty of non-entry consists, in proper blench-holdings, of a very moderate payment, known as the 'retour duty,' or 'new extent' of the lands; being the valuation put upon the lands in the 14th century, or gradually adopted thereafter. Where the lands are held blench in place of ward,

RETOUR DUTY.

¹ *Consuetudines Feudorum*, ii. 24.

² Robin, 13th June 1823, 2 Sh. 404.

the non-entry duty consists of one per cent. on the old valued rent, at which the lands were assessed for public taxes in or about the time of Cromwell. This payment falls due termly, at Whitsunday and Martinmas, during the period of the non-entry. In feu-holdings, the non-entry duty is the feu-duty; and practically it produces nothing to the superior, because the feu-duty is payable at any rate; and non-entry duties are not payable over and above. The non-entry is also excluded if the superior's own title is not completed; because then the superior cannot validly grant an entry, and delay in taking the entry is not attributable to the vassal. The superior is excluded also if there is any liferent vassal in possession, under charter from the superior, who then has a vassal in the liferenter; likewise as to a married woman's lands, when a surviving husband is in possession, in virtue of his courtesy,—then, also, there is a vassal, the husband possessing in virtue of his wife's infetment; or the reason may be, that the heir is himself excluded from possession. Exclusion, to the extent of a third, takes place when a widow is in possession of her deceased husband's lands in virtue of her terce. The possession of the superior, however, even when in virtue of a decree of non-entry, can be terminated by the heir coming forward and obtaining an entry. The superior's right of possession, in that case, is not permanent.

Non-entry has no place in burgage-holding; because the burgh or corporation, which never dies, is the vassal, and the lands are thus never in non-entry.

2. *Relief*.—This is the fine, or casualty, payable by the heir of a RELIEF. vassal to the superior on the heir's succession to lands held in feu or blench-farm; and on his relieving the lands out of the superior's hands, into which they are held to fall by the last vassal's death. Anciently, this casualty was said to be given by the heir in *redemption* of the feu,—afterwards in *renovation* of it,—terms which Dalrymple, in his *Essay on Feudal Property*, says contain a solid distinction.¹ At first, the effects of the old principle so far remained, that, when the feu was renewed in the person of the heir, it was supposed to be in consequence of a voluntary agreement betwixt the overlord and him; then the payment was said to be given in redemption; but, in after periods, it was conceived to be in consequence of an absolute obligation upon the overlord to renew. Thence it was said to be for renovation.

The casualty was known in ward-holdings, in which it was the payment made by the heir for relieving his lands out of the superior's ward.

The amount of the relief was originally a year's rent of the lands; but it has long been restricted to a year's feu or blench duty, as the case may be, over and above the blench or feu duty of the year. This casualty is exigible whether stipulated for in the charter or not,—a point formerly of some doubt, but now settled as here stated.

¹ Dalrymple on Feudal Property, p. 47.

COMPOSITION.

3. *Composition*, or the entry-money, or fine, payable by a stranger or singular successor, requires here to be noticed; for, though in a very strict sense it is not a proper feudal casualty, it is commonly understood and spoken of as such in modern phraseology.¹ When the Legislature made it compulsory on superiors to enter persons having judicial titles, a year's rent of the lands was declared payable to the superior as the consideration for his granting the entry. The Acts ordaining entries to be given to ordinary purchasers provide for the payment to the superiors of the fees or casualties which they are by law entitled to receive. This general expression may have arisen because there was no enactment fixing the rate of entry-money in such cases, and the early practice was not altogether uniform. But, more probably, it arose from the fact that, in some cases, the entry-money payable by singular successors was matter of special agreement, fixed, or, as it is technically called, 'taxed,' by charter; and it was not intended to interfere with private arrangements so made. For a long time, however, the rule in practice, with reference to ordinary purchasers, or other singular successors, has been the same as that established by Statute as relative to judicial purchasers; and all have been entered as vassals on payment of one year's rent or value, as the lands are set, or—if not in the hands of third parties or tenants—are worth for the time; a payment which, on account of its origin in the system of compounding formerly explained, and likewise from a corresponding term in use in England, has acquired the name of 'composition.'

Composition is payable as well in blench as in feu holdings. The manner in which it is to be estimated, in particular cases, and its other peculiarities, will be stated in connexion with the subject of the transference of feus.

IRRITANCY *ob non solutum canonem.*

4. There is another incidental right, peculiar to feu holdings, which is frequently classed among casualties of superiority, though more properly it is a contingent irritancy for enforcing payment of feu-duties, rather than a feudal casualty. It was introduced for the above purpose by the Act 1597, cap. 250, which provides that, if the feu-duty shall remain unpaid for two whole years together, the vassal shall tyne or lose his feu, in like manner as if his charter contained a clause declaring the feu to be null, upon such failure in payment. As a general rule, therefore, every charter of lands held feu now embraces, by force of this Statute, a clause to the above effect. Sometimes, also, charters contain express clauses to the same effect; but, on the other hand, they sometimes contain an express renunciation of the statutory provision. When the nullity, or irritancy, is incurred, it does not operate to extinguish the vassal's right *ipso facto*. In order to enforce the nullity, the superior must bring an action into Court, called a declarator of irritancy, or tinsel of the feu, *ob non solutum*

¹ Lord-Justice Clerk Hope in Stirling, 14th February 1842, 4 D. 684; Lord Brougham in same case, affirmed 4th Sept.

1844, 3 Bell's App. 128; Edinburgh Gas Light Co., 5th July 1843, 5 D. 1325.

canonem. And the irritancy, whether founded on the Statute or on an express clause in the charter, can be purged at the bar,—that is to say, the vassal can exclude the forfeiture by paying the feu-duty in arrear in Court at any time before the decree against him is extracted.¹ But, after decree *in foro*, the superior's right is permanent. If the vassal allows decree to pass *in foro*, he is not entitled afterwards to reduce it upon tendering payment of the arrears.² Where the irritancy is conventional—that is, is expressed in the charter,—it was formerly held that the vassal could not purge at the bar, unless he could give a reasonable excuse for his previous delay.³ But that rule appears to be now altered; and charters, with and without express clause, seem to stand on the same footing in this respect.⁴ If, however, the superior betakes himself to this remedy, he cannot claim the arrears of feu-duty. The object of the Statute is to give him back the lands, in case the vassal shall fail to pay the feu-duty,—that is, to fulfil the condition on which he holds them.⁵

Lastly, there is attached to the right of superiority in feu and blench holdings the casualty of *liferent escheat*, at one time very oppressive, but now almost unknown in practice. Formerly, whenever a vassal was denounced rebel, simply for non-payment of a debt, he was regarded as civilly dead, and his lands fell, or were escheat, to the superior during his lifetime. By the Act 20 Geo. II. cap. 50, sect. 11, this penalty was abolished when the denunciation was for a civil debt or obligation. But upon denunciation for a crime, if the vassal remain at the horn,—that is, a rebel,—unrestored or unrelaxed for a year and day, he is still held civilly dead, and the liferent of his lands falls to the superior, excepting in cases of treason. In these, the absolute fee of the vassal's heritage is forfeited to the Crown. The casualty of liferent escheat arises also upon the vassal's receiving sentence of death and escaping, as by the sentence he is disqualified from holding the feu. When the casualty falls, the right of the superior to the vassal's lands exists during the vassal's lifetime. The vassal, however, still has right to the fee, of which he may dispose at his pleasure, provided he does not prejudice the party entitled to the liferent escheat.⁶

The subsisting casualties of superiority, therefore, are—(1.) Non-entry, payable with reference to the period during which the superior is without a vassal. (2.) Relief, or the entry-money payable by the heir on his being received as the vassal. (3.) Composition, or the entry-money payable by a singular successor, or stranger, on his being received as vassal. (4.) The forfeiture, or irritancy, arising in lands held in feu-

¹ Campbell, 16th July 1777, M. 7252; Campbell, 7th March 1794, M. 321.

² Ballenden, 6th July 1792, M. 7252.

³ Wedderburn, 13th Feb. 1666, 2 Br. Sup. 138.

⁴ Lord Corehouse, and other Judges, in Coutts, 3d Aug. 1840, 1 Robin. App. 316.

⁵ M'Vicar, 10th Feb. 1749, M. 4180; Magistrates of Edinburgh, 16th May 1834, 12 Sh. 593.

⁶ M'Rae, 22d Nov. 1836, 15 Sh. 54; affirmed 27th June 1839, M'Lean & Robinson's App. 645.

farm, in case of non-payment of the feu-duty for two whole years together. And, (5.) The liferent escheat, being the right to possess the lands during the lifetime of a vassal who has been denounced rebel with reference to a criminal charge, and remains unrelaxed for year and day, or has been sentenced to death for a capital crime and has escaped.

All these casualties or claims are inherent rights attached by law to the estate of the superior, and no express clause is required, either in his titles or in those of his vassal, in order to their being constituted or enforced; although express clauses may be introduced in the vassal's title for making the superior's right more stringent. The superior's original title embraces them all; and they are parts of his reserved estate, after granting the feu, as much as the annual, or other payment, which he stipulates to be made as the condition of his granting the feu. We shall see also that, when the superior transfers his estate of superiority, he does not require to express specially that he transfers the above rights, or any of them. They are attached by law to the estate, and, when it is conveyed, they pass with it as matter of course. Indeed they are so absolutely attached to the estate of superiority, that the superior cannot, without special power in his contract with the vassal, alienate that estate without conveying them along with it. He cannot, at Common Law, reserve the casualties as a separate right, or convey the casualties to a third party, reserving the superiority.

MODIFICATION
OR RENUNCIATION
OF CASUALTIES.

But superiors can modify or renounce these rights or casualties, or any of them; and the question now before us is—what is the proper mode of effectually doing so?

When the original feuar of lands has stipulated that there shall be no casualties exigible by his superior, the best mode of effectually securing him is to introduce in the original charter a disposition, not only of the lands, but of the casualties, and to make the right to the casualties real, along with that to the lands, by registering the disposition in the Register of Sasines.¹

Supposing an original investiture to have been constituted, without renunciation or disposition of casualties, the parties may wish, by a subsequent transaction, to exclude or modify the right to future casualties. For this purpose there ought to be either a renunciation from the superior, in favour of the vassal, of the casualties, wholly or partially, as may have been arranged between them; which renunciation ought to be recorded in the Register of Sasines; or there ought to be a charter of *novodamus*, that is, a charter by which the superior of new gives and disposes the lands to the vassal, together with the casualties, wholly or partially, as in the case of a renunciation. On such charter being recorded in the Register of Sasines, the vassal will be in the same position as if he had at the first obtained a disposition of the lands with the casualties, and had made his right real. The discharge of casualties, or of the casualty payable on one particular entry, may further be made

¹ This was found effectual in *M'Vicar*, 10th Feb. 1749, M. 4180 & 10,251.

binding on singular successors in the superiority, by being declared in the disposition of superiority a burden on the donee, and his successors in the lands, and imported into the register as a qualification of the donee's right. In such case the obligation on the superior is not merely personal, but real.¹ It is clearly better, however, to embody the discharge in the vassal's title, and get it feudalized and made real as part of that title. But, supposing that there is no disposition or renunciation, or obligation on the successor in the lands, published or imported into the record, but simply a discharge by the superior in favour of the vassal contained in the charter, are the casualties so inherent in the estate of superiority as to be necessarily part of it, unless disposed or renounced by a deed placed on the Register of Sasines? And is a singular successor in the superiority entitled to look for the full legal casualties, even if they have been disposed or renounced by the original charter, if the disposition or renunciation has not been published by registration?

This question occurred in the case of *Nasmith*,² where the original charter renounced the casualty of non-entry, and conveyed it to the vassal; but the vassal's sasine did not import the renunciation and conveyance into the register. The Court at the first, and viewing the question as purely a point of feudal law, decided against the vassal, and in favour of the singular successor in the superiority. But, finding that the feu-right which contained the renunciation and conveyance was expressly excepted from the obligation of warrandice in the subsequent disposition of the superiority, they held the singular successor in the superiority bound by every clause of the feu-right, because he had accepted his conveyance under burden of the feu-right.

The general point thus remained unsettled. In reference to transactions completed since the Titles Act came into operation, the question is not likely to arise, because of the practice of recording charters, and thereby publishing and making real whatever particulars of the nature of conveyances, renunciations, or discharges they may contain. In other cases the necessity for the consideration of the question will, for the most part, be avoided by the means which proved effectual to exclude the superior in *Nasmith's* case. When it does come up, as a pure feudal question, in a case where the disposition, renunciation, or discharge is in the charter, and is not placed on the Register of Sasines, the decision, I think, will turn on this, viz., Whether such disposition, renunciation, or discharge is one of the natural and proper conditions of the mutual feudal contract, or is merely a personal obligation by the superior for the time? In the latter view, it ought not to be binding on his singular successor, any more than a disposition of the lands themselves, not made a real right by registration or infeftment. In the former view, a real right has been obtained, subject to the conditions contained in the charter. The vassal, or his successor, is entitled to hold the lands so long as he fulfils

¹ *Learmonth*, 15th Feb. 1854, 16 D. 580.

² *Nasmith*, 9th Nov. 1748, M. 5723.

these conditions. And if one of the conditions is that heirs and singular successors shall pay nothing, or shall pay a modified sum, on their entry, the proprietor should be entitled to hold, on fulfilling that condition, just as much as (supposing no entry to fall due) he would be entitled to hold on payment of the feu-duty or the blench-duty, if required. This view, I think, is established by the case of *Stewart*.¹ A party there feued out lands and teinds for a price paid down, and a feu-duty which was charged on the lands and teinds *in cumulo*; and he bound himself to relieve the feuar and his successors of all augmentations of stipend to be imposed on the teinds. A new vassal in the lands and teinds, being a singular successor of the original feuar, claimed relief of augmentations of stipend from the superior, who was heir and representative of the granter of the original obligation. It was objected that the new vassal had not obtained an express conveyance to the original obligation of relief from such augmentations granted by the superior's predecessor; but it was the opinion of the majority of the Court of Session, and of the House of Lords, that, as between the superior and vassal, such obligation, being part of the original contract, was inherent in that contract; that it was necessarily renewed with every renewal of the vassal's right from the superior, whether expressed in such renewals or not, and was therefore available to the new vassal, though a singular successor, without assignation from the original vassal. The transaction between the parties to the feu was a mutual contract, and neither party could require fulfilment of the one part, without himself fulfilling the counterpart of the contract. In the same case the Lord Justice-Clerk Inglis, and Lords Benholme and Neaves, said, 'Whatever stipulations may be made in a feu-contract, as to the restriction of those prestations and casualties (naturally falling to the superior), will receive their full effect.'²

But any question on such a subject can easily be prevented, under the older system, by inserting a disposition or renunciation of the casualties in the dispositive clause of the charter, and engrossing the same in the sasine thereon; and much more securely now by engrossing them in the charter, and seeing the charter duly recorded in the Register of Sasines. And on the transfer of a superiority-estate, burdened with such an obligation as in *Stewart's* case, the vassal's rights should be made burdens on the disponee, by excepting them from the warrandice of the disposition to him, as in *Nasmith's* case (which is the usual course), or in some other distinct mode.

¹ *Stewart*, 15th Feb. 1860, 22 D. 755; affirmed 27th March 1863, 4 Macq. App. 499.

² 22 D. 777.

CHAPTER IV.

WE now return to the proper clauses of an original feu-charter. After the dispositive clause, we meet with the first alteration of form introduced by the Lands Transference Act.¹ Formerly, the clause called the *tenendas* followed the dispositive; now we have, before the *tenendas*, the declaration of the term of the new proprietor's entry, which, in the old form, was usually incorporated with the assignation to rents. TERM OF ENTRY.

The words are, 'with entry at the term of' (Whitsunday or Martinmas 1865, or whatever else may be agreed on). It is safest to describe the term absolutely by the year, and not relatively to the date of the deed, lest inaccuracy may arise through delay in signing the deed. The right to rents, and liability for annual burdens, regulated by the term of entry, will be explained when we come to consider the clause of assignation to rents.

The next clause is called the '*tenendas*,' from the first word used in the corresponding clause whilst charters were written in Latin, '*tenendas predictas terras*,' etc. TENENDAS. The form of this clause in an original charter is not affected by the Conveyancing Acts. The words are, 'To be holden, 'the lands and others before disposed, by the said B. and his foresaids, of 'and under me, and my heirs and successors, as immediate lawful superiors of the same, in feu-farm,' (or 'in blench-farm,' as the case may be), 'and fee and heritage for ever.' The objects of the clause therefore are—(1.) to point out the superior of whom the lands are to be held, and who, in an original charter, can be only the granter, as no one can create a new fee to be holden of another; and (2.) to specify the tenure or manner in which the lands are to be feudally held. And you will observe that there is no difference between the clause in a feu and blench charter, except that the one describes the tenure as feu-farm, the other as blench-farm.

In early times, the *tenendas* clause held a much more important position in the charter. It not only expressed, in a long enumeration, all the privileges, servitudes, etc., usually connected with a grant of lands, as accessories or pertinents, but it likewise contained the destination of the lands to heirs, technically known as the '*habendum*.' In both respects the *tenendas* is now superseded by the dispositive clause, which, however, does not keep up the enumeration of the accessory rights. These, when not reserved, pass with the lands.² OLDER FORM OF TENENDAS.

The specification of these accessory rights, in the *tenendas* clause, disappeared long ago from charters by subjects. It was preserved in charters from the Crown until the Crown Charters Act³ came into operation; since which time it has been dropped. But, even when con-

¹ 10 & 11 Vict. c. 48.² Erskine, ii. 3. 24.³ 10 & 11 Vict. c. 51.

tained in charters from the Crown, the specification in the *tenendas* clause was of no avail in supplement of the dispositive, which, as regarded the extent or measure of the grant, was the ruling clause. This is instructed by several cases,—particularly that of Aboyne,¹ where it was found that a right of hunting and fowling, over a separate estate, was not effectually conveyed to the Crown vassal by the words '*cum aucupationibus et venationibus*,' merely in the *tenendas* clause.

The meaning of the various terms descriptive of pertinents or accessories, usually occurring in the old form of the *tenendas*, is explained in Ross's Lectures,² and also by Erskine.³

REDDENDO.

The next clause is the *reddendo*, which also derives its name from the first word in the corresponding clause in the Latin charter, '*reddendo inde annuatim*,' etc. It is this clause which fixes the nature and amount of the payments, or prestations, to be made or performed by the vassal to the superior.

In modern grants we seldom meet with any stipulation except for a payment in money or grain. But in those of older date, services of various kinds were very frequent. By the Clan Act, all clauses in charters, stipulating for services of personal attendance on the superior, hosting, hunting, watching, and warding, were annulled; and in lieu thereof money compensation was made payable; the amount to be fixed by the Lords of Session, supposing the parties themselves could not agree.⁴ The compensation was, in general, fixed on very moderate principles. Other prestations, of a character different from that of military service, may be said generally to remain in force. An obligation on the vassal, on his own expense, to uphold a boat with rowers and steersman, and all things necessary for the use of the superior and his family, and to keep the superior's mansion-house wind and water-tight, was held not to fall under the Statute.⁵ An obligation to deliver a certain quantity of peats at a castle specified was found to remain in force, though the castle had fallen into ruins, and the vassal's lands had no mosses yielding peats.⁶ Agricultural services and carriages, such as furnishing reapers in time of harvest yearly, are exigible only if called for within the year. But arrears of payments in kind, such as kain fowls, are exigible for years bygone.⁷ Such arrears are payable either in kind or according to the market value of the articles in the several years over which the arrears extend.⁸

FEU-DUTY.

The feu-duty is not only a burden on the lands, but a debt for which the vassal is personally liable. The charter constitutes a contract which

¹ Aboyne, 16th November 1814, F. C. ; affirmed 22d April 1818, 6 Paton's App. 380.

² Ross's Lectures, ii. 166.

³ Erskine, ii. 6. 6, *et seq.*

⁴ 1 Geo. I. Statute 2, c. 54, ss. 10, 11, & 12.

⁵ Duke of Argyle, 5th Feb. 1762, M. 14,495.

⁶ Monro, 20th June 1763, M. 14,497.

⁷ Young, 7th Dec. 1693, M. 13,071.

⁸ Duke of Hamilton, 15th Dec. 1835, 14 Sh. 162; affirmed 12th May 1837, 2 Sh. & M'L. App. 586. The report does not say in whose option the kain, or the money, was to be payable.

gives a personal action for payment; and the vassal remains liable both FEU-DUTY. for bygone and future feu-duties, notwithstanding the sale of his lands, until the purchaser becomes vassal by obtaining an entry from the superior, and subjecting himself to the personal obligation.¹ Upon such entry delegation takes place; the burden of future feu-duties falls upon the new vassal, with entire relief to the old, except as to by-gones.² The vassal, moreover, cannot renounce, or, as it is called, 'refute' his feu *invito superiore*, to the effect of becoming free of the personal obligation even for future feu-duties.³ And where the vassal, besides undertaking his obligation in the usual form by the feu-charter, or by a feu-contract, grants a separate personal bond to the superior, binding himself, and his heirs and successors, for payment of the feu-duty, the obligation in the personal bond is independent of that constituted by the feu-charter or feu-contract. The obligation arising from the proper feudal contract passes with the lands; but that contained in the personal bond remains incumbent on the granter of the bond, notwithstanding the sale of the lands, and is not got rid of by the entry of the purchaser as vassal.⁴ The obligation under the separate personal bond remains permanently a burden on the granter of the bond, who cannot get rid of it except by consent of the grantee. The feu-duty forms a charge also on the lands. The payment of it is one of the conditions of the grant. And, the superior having a real legal estate in the lands, having in fact the right to the lands, and to eject the vassal if he does not fulfil the condition by paying the feu-duty, the feu-duty is a real and preferable burden on the lands,—a *debitum fundi*. It is part of the reserved estate in which the superior stands infeft; and the superior's claim for payment of the feu-duty is ranked as a burden on the feu, in preference to the claim of any third party upon such feu made through the vassal. The lands, as given out to the vassal, and held by him, are subject to the burden; and he cannot give any right to the lands otherwise than subject to the same burden. The superior's right to the feu-duty is preferable to the vassal's right to the lands.

Feu-duties do not bear interest by law until a judicial demand for payment is made. After such demand, interest runs *ex mero*; ⁵ and where the price of the site of a burnt tenement in a royal burgh, sold under authority of the Act 1663, cap. 6, was consigned in bank in a process of multiplepoinding, and the superior was ranked preferably thereon for arrears of feu-duty, he was found entitled to bank interest on the arrears from the date of the consignment.⁶ It is usual, however, in modern feu-rights, to stipulate for payment of interest, and likewise

¹ Hyslop, 13th March 1863, 1 Macph. 535.

² Wallace, 29th Jan. 1739, M. 4195.

³ Hunter, 16th December 1834, 13 Sh. 205.

⁴ King's College of Aberdeen, 11th Aug. 1854, 1 Macq. App. 526; reversing the

judgment of the Court of Session, 11th March 1852, 14 D. 675; Brown's Trustees, 26th March 1855, 2 Macq. App. 40; reversing the judgment of the Court of Session, 11th March 1852, 14 D. 680.

⁵ Tweeddale, 2d March 1842, 4 D. 862.

⁶ Pollock, 28th Jan. 1862, 24 D. 372.

for a fifth part more of penalty in case of failure. In these cases, the terms of the obligation are similar to those of a bond of annuity; and the rate of interest, which in general will be five per cent. per annum, should now be expressed.

ENTRY OF
HEIRS AND
SINGULAR
SUCCESSORS.

The *reddendo* usually stipulates for payment of one year's feu-duty, over and above the current feu-duty of the year, on the entry of each heir; the following being the words used: 'Doubling the said feu-duty the first year of the entry of each heir to the said lands, as use is of feu-farm.' This means that each heir shall pay for the year of his entry two years' feu-duties; one for relief or entry-money, and the other as the ordinary payment due for the year. The extra year's feu-duty is due whether stipulated for or not.¹ If it is intended to make the heir pay two years' feu-duties, in name of relief or entry-money, the simplest course, I think, is to say—'Paying the sum of £ (that is, the amount of two years' feu-duty) for the entry of each heir, over and above the feu-duty of the year in which such entry shall take place.' But the more usual way is to say—'Doubling the said feu-duty the first year of the entry of each heir to the said lands, besides paying the feu-duty of the year in which such entry shall take place.' The same result arises when the obligation is to pay 'a duplicand of the said feu-duty over and above the feu-duty of the year.'² In the Earl of Zetland's case an inquiry was made into the practice, and a tabular view contained in the report gives seven different forms of the clause, each inferring the payment by the heir upon his entry of two years' feu-duty over and above the feu-duty of the year in which the entry takes place. In regard to singular successors, or strangers, the charter may either stipulate for a particular amount, or rate, of entry-money; that is, it may 'tax the entry,' as it is technically called; or it may leave the legal rule of liability to operate, in which last case a year's free rent or value is payable for the entry. I will notice the rules for ascertaining the free rent, when considering the subject of the completion of titles in the person of singular successors. I may remark here that, where lands are feued out at high rates of feu-duty, a heavier burden may be imposed by stipulating for one year's or two years' feu-duty, on the entry of singular successors, than by allowing the legal rule to operate. Because, in estimating the free rent, the feu-duty of the year is to be deducted; and it may be that the rent remaining after that deduction is not equal to the amount of one, or, at all events, of two years' feu-duty. If the entries of singular successors are to be taxed, one and the same clause, or the same forms of words, may be employed for that purpose, as with reference to the entry of heirs. Where the amount is considerable, it is not unusual to stipulate for penalty and interest, as in the case of an ordinary money liability.

In modern practice, and specially in connexion with feus for building purposes, these casualties are frequently reduced into fixed periodical

¹ Erskine, ii. 5. 48.

² Earl of Zetland, 30th June 1841, 3 D. 1124.

payments ; the interval at which they successively fall due being from eighteen to twenty-five years. This is a great improvement on the older system, which leaves them to depend on the lives of successive vassals. It would be a further improvement if they could be commuted into fixed annual payments, and the casual payments abolished altogether.

In blench-holdings, it is not usual to insert the obligation to double the blench-duty on the entry of heirs ; but, if it is intended to tax the entry of singular successors, an express clause is requisite. Should nothing be said on the subject, the general rule of law will operate, and one year's free rent will be payable by singular successors as entry-money.

After the *reddendo*, the order of the clauses in the new and old styles respectively varies, and, in most instances, their form also. The clauses are as follows :—

OLD STYLE.

Clause of warrandice.

Assignment to writs.

Assignment to rents.

Clause of warrandice thereof.

Clause settling the obligations of buyer and seller, respectively, as to the payment of feu-duties to the seller's superior, and of public and parochial burdens.

Clause as to the exhibition or delivery of writs.

Clause of registration.

Precept of sasine and testing-clause.

NEW STYLE.

Assignment to writs, and clause as to exhibition or delivery thereof.

Assignment to rents.

Clause as to feu-duties and casualties to the seller's superior, and public and parish burdens.

Clause of warrandice.

Clause of registration and testing-clause.

CLAUSES
FOLLOWING
REDDENDO.

Before the passing of the Titles Act of 1858, the modern form contained a precept of sasine equally with the old form ; the style of the precept being shorter and more simple.

The import of the clauses is nearly the same, both under the old and new forms ; and I propose to explain them in the order of the modern deed.

The first is the assignment to writs. The form in the Lands Transference Act is,—‘ And I assign the writs, and have delivered the same according to inventory ; ’ which clause the Statute declares to import, unless specially qualified, ‘ an absolute and unconditional assignment to such writs and evidents, and to all open procuratories and precepts therein contained, to which the disponent has right.’¹ This result is beyond the province of the original charter ; being appropriate to the disposition of an existing estate, the titles of which are transferred absolutely, and delivered along with the estate itself. But by the charter we are creating a new estate. The granter of the charter does not transfer the writs absolutely ; because they contain his own

ASSIGNATION
TO WRITS.

¹ 10 & 11 Vict. c. 48, s. 3.

right, as well as the new estate ; indeed, in one view, the charter is the only writ applicable to the new estate ; as, in a strictly feudal sense, none of the previous writs contain that particular estate. It was not feudally in existence at the time when these previous writs were executed. But the charter not only creates a new estate, but operates the transfer, to a certain extent and effect, of the granter's existing estate ; and, if the title of the new vassal is objected to, he must fall back on the granter's title to support it. The new vassal has thus a material interest in the existing titles, and in obtaining exhibition of them when they are required ; and the charter, accordingly, expresses the clause relative to the writs, as follows, viz :—‘ And I assign the writs, ‘ but to the effect only of maintaining and defending the right of the ‘ said B. in the said lands : for which purpose I oblige myself to make ‘ the same, to the extent of a legal progress, forthcoming on all necessary ‘ occasions, conform to an inventory thereof subscribed by me, as relative ‘ hereto ; and that on the receipt of the said B. and his foresaids, and ‘ their obligation to re-deliver the same within a limited period, and ‘ under a suitable penalty in case of failure.’

In reference to this clause, you will remember that, where the writs are to be assigned to any effect beyond what is appropriate to them simply as feudal titles, the assignation requires to be amplified. If, for example, the granter of the charter holds an obligation of relief against augmentation of minister's stipend, or public or parish burdens of any kind, such obligation ought to be specially assigned, as far as it relates to the lands disposed ; and the form of the assignation ought to be just as full and explicit as that of the assignation of an ordinary bond or similar writing. We are not here dealing with obligations of the above nature by a superior to his vassal, which, as already observed, are renewed with every renewal of the investiture. We are considering the original charter creating a new fee or feudal estate, and the case of the disposer having right to obligations of relief or augmentation of stipend ; and if the charter, in such circumstances, expresses merely the usual assignation of writs, it will be held to transfer no more than is covered by such assignation in an ordinary case of the transfer of lands without special obligations of warrandice or otherwise. The clause of assignation to writs makes reference to ‘ a legal progress,’ the meaning of which will be explained in connexion with dispositions operating the transmission of estates.

**ASSIGNATION
OF RENTS.**

We next have the assignation of rents. This clause, in the new form, imports, unless specially qualified, assignation to the rents to become due for the possession following the term of entry, according to the legal and not the conventional terms ; unless in the case of forehand rents, in which case it is held to import an assignation to the rents payable at the conventional terms subsequent to the date of entry.

**LEGAL AND
CONVENTIONAL
TERMS.**

In explanation of the expressions, ‘ legal terms,’ ‘ conventional terms,’ and ‘ forehand,’ as applied to rents, it may be necessary to state shortly

that the rent of lands for every half-yearly term is legally due on the last day of the term, that is at Whitsunday, 15th May, and Martinmas, 11th November yearly. But in proper agricultural possessions such rent is seldom conventionally due, that is, is seldom made payable by the agreement of parties, until six or nine months, and sometimes not until twelve months later. The rent may be called the landlord's portion of the produce; and, as it should be paid out of the produce, the conventional postponement of the payment takes place to allow the tenant time to reap and sell his crop, and pay the rent out of the proceeds. To take an example: Suppose that the tenant enters at Martinmas 1856; he has been half a year in possession by Whitsunday 1857, which, accordingly, is the legal term when the rent for the half-year's possession after Martinmas 1856 is due; but he has neither disposed of, nor even reaped, any crop; and the conventional term of payment of that half-year's rent may be Martinmas 1857, or even Candlemas or Whitsunday 1858; by one of which terms he has certainly reaped, and ought to have disposed of, the crop of 1857. At each term of Whitsunday and Martinmas, therefore, there is due, legally, the half-year's rent for the possession during the term then ended. And at the same time, or later, as the case may be, there is usually due conventionally, or by agreement of parties, the half-year's rent for the possession during a term preceding that which has just ended. But the rent for the possession during the term preceding the purchaser's entry belongs to the seller; he was the owner of the lands during that term; and the statutory form, accordingly, gives the purchaser the rents falling due for the possession after his entry, according to the legal, and not the conventional, terms of payment. A purchaser, therefore, with entry at Martinmas 1856, does not draw the rents conventionally due at or after Whitsunday 1857, so far as these are in respect of the possession, up to, or preceding, Martinmas 1856, the date of the purchaser's entry. The purchaser has right to the rents legally due for the possession after the term of his entry, and no more. That is the fair and ordinary arrangement; and, when any alteration is to be made on it, you will keep in mind the necessity of showing explicitly the nature and extent of such alteration; as *in dubio* the usual arrangement will be presumed.

And here it will be important to keep in view the peculiarities connected with grass or pasture farms, or with farms consisting partly of pasture, partly of arable land. In such farms, the tenant usually enters to the houses and pasture land at Whitsunday, and to the arable land, if any, as there almost invariably is, at the separation of the corn crop from the ground, or Martinmas following. And it is held that at the Whitsunday, being the day of the entry to the houses and pasture, there is legally due half a year's rent. Independently, therefore, of stipulation or understanding to the contrary, a tenant entering to such lands at Whitsunday would be liable to pay half a year's rent on the day when he entered; and the seller, giving entry to the purchaser at the

PASTURE AND
ARABLE FARMS.

same Whitsunday, would have right to that half-year's rent so payable by the new tenant.

This rule is different from that prevailing in the case of arable farms. The tenant in such farms, no doubt, often enters to the houses and grass at Whitsunday, and to the arable land at the separation of the crop, or Martinmas following. But he is in no case legally liable to pay any rent on the day of his entry to the houses and grass, nor even at the Martinmas following. His legal liability (independently of contrary stipulation) commences at the term of Whitsunday, twelve months after entry to the houses and grass, and six months after entry to the arable lands.

When the farm is partly arable, partly pasture, it is necessary to ascertain, as a matter of fact, the general character of the farm, as chiefly arable or chiefly pasture; and that will apparently be decided by the answer to the question, from which of the two sources—the arable land or the pasture land—are the tenant's profits chiefly derived? That point of fact being ascertained and settled, the farm will be dealt with (as to the legal right to the rents) in the same way as if it had been wholly pasture or wholly arable, according as the pasture or the arable land is found to predominate. There will be no distribution of the rent, giving so much to the arable land and so much to the pasture. If the arable predominates, the pasture will be held as an accessory or pertinent; and, if the pasture predominates, the arable will be held as an accessory or pertinent.¹

Practically, this is a matter of very considerable consequence in reference to the entry of a purchaser. If the farm is wholly arable or wholly pasture, it is not likely that there will be much misunderstanding; because the rules, applicable to each class of cases, are well defined and distinct. But, where the farm is partly arable and partly pasture, there is risk of misunderstanding and disappointment. Thus, if a farm is chiefly pasture, the purchaser, entering at Whitsunday, will derive no benefit from the corn crop then in the ground. It is an adjunct or pertinent of the preceding year's grass crop, and belongs to the seller. And, on the other hand, if the farm is chiefly arable, the purchaser will draw the rent arising not only from the last half of the corn crop in the ground at the time of his entry, when that shall fall due, but also of the grass crop of the preceding year, which, in the case supposed, is an adjunct or pertinent of the corn crop. But where the purchaser of an estate, entirely pastoral, obtained entry at Whitsunday 1856, with right expressly to the rents to become due for the possession from and after that term, this was held a special contract; and the purchaser was found entitled to the rents due at Martinmas 1856, under leases to tenants who entered at the Whitsunday term, and were bound to pay the first year's rent at the terms of Martinmas and Whitsunday following their entry. Having entry at Whitsunday only, and no possession previously, the

¹ Petley, 21st Nov. 1805, Hume, 186, and cases there cited.

rent payable at the Martinmas following could be only for the possession from the Whitsunday. The purchaser's right was, therefore, held to be good, by the express terms of the conveyance in his favour; whether or not these rents were legally due at the Whitsunday (the term of his own entry), and only payable at the Martinmas following.¹

Rents are said to be *forehand* when they are conventionally due before the legal term comes. When, for example, a tenant, entering at Martinmas, pays a whole or half a year's rent on his entry, or at some time before it is legally due. In such cases (which are not very common in Scotland) the purchaser's right, under the Statute, does not draw back. He receives whatever is conventionally payable after the term of his entry, but no more. The result may be that he does not receive the whole rent applicable to the possession of the lands after the term of his entry. In a case where rents were payable *forehand*, the purchaser bought with entry at Martinmas 1856; the seller having right expressly to the rents of crop 1856, described as 'being those payable at Candlemas and Lammas 1857.' The seller uplifted the rents so payable; but on its being proved that they were *forehand*, and were truly due for crop 1857,—that is, for the possession from Martinmas 1856 to Martinmas 1857, which clearly the seller had not reserved,—the Court preferred the purchaser, to whom they appointed the rents to be paid over.²

The provisions of the Acts now referred to call for careful examination of leases, and of the proper character of farms, as arable or pasture, before concluding the sale or purchase of any lands which are in the hands of a tenant, or even when the lands are in the natural possession of the proprietor; for it does not appear that one who is in the natural possession of a farm ought to be in a different position, as regards the right of possession, from that of a proprietor who has let his lands to a tenant. After informing yourselves as to the facts, you can make provision, if required, for variations on the statutory arrangement. But let me remind you to take care that these provisions are free of all ambiguity of expression; for *in dubio* the bargain will be held as agreeable to the general rules.

The right to the rents follows the acquisition of the lands, independently of any assignation; but the assignation ought always to be inserted in the charter or disposition; and if, from any cause, the donee's right is not to be made immediately real by registration, or infeftment, the assignation ought to be intimated to the tenants. An assignation of rents, however, though intimated, would not prevail (except as to arrears of rents) in competition with a subsequent disposition from the seller, first followed by registration or infeftment; or with a heritable bond by the seller, first duly recorded. So far as regarded rents current and future at the date of the publication of the purchaser's

¹ Hunter, 19th Nov. 1857, 20 D. 60.

² Dalrymple, 12th June 1860, 22 D. 1177.

or creditor's title, the assignation intimated would be unavailing in such competition. It gives a mere personal right, which cannot compete with a real right, *bond fide* obtained, and first duly completed.¹

The clause in the older form was of the same import as the new clause is by the Statute, unless, perhaps, in the case of forehand rents. Apart from special stipulation, the old clause would probably have given to the disponent right to the rents corresponding to the possession after the term of his entry, whether payable forehand or not. But the point is now of no practical importance.

CLAUSE OF
RELIEF FROM
FEU-DUTIES
AND PUBLIC
BURDENS.

We have next in order an obligation by the seller to relieve the purchaser of the bygone feu-duties, casualties, and public and parish burdens. The words of the new style are,—‘ And I bind myself to free ‘ and relieve the said B. and his foresaids of all feu-duties, casualties, ‘ and public burdens;’ and their statutory import, when not specially qualified, is an obligation on the seller to relieve the purchaser of all feu-duties, or other duties, and services, or casualties, payable to the seller's superior, and of all public, parochial, and local burdens due from or on account of the lands prior to the date of entry. This is to the same effect, as regards bygones, with the clause in the older form.

In reference to future burdens, such as cess, poor-rates, erection and reparation of parochial buildings, schoolmasters' salaries and local assessments, nothing requires to be said in order to throw the liability upon the purchaser of the lands, nor to throw on him the burden of the minister's stipend, if he has bought the teinds. They affect him and his purchase by law, and as matter of course. But the case of feu-duties, and other duties and casualties, to the seller's superior, is different. The seller retains the superiority. He retains the estate, holden of his own superior, out of which the feu-duties, etc., are due. Accordingly, if it is intended that the purchaser shall be liable for the future feu-duties, and other duties and casualties, to the seller's superior, a special obligation to that effect has to be imposed on him in the charter.

The term ‘casualties,’ as here used, appears to apply to all sums due by the granter to his superior, in consequence of the feudal relation subsisting between them, and to include the composition payable for the seller's entry with his superior. But (as I have said), this being the case of the creation of a new feudal estate, the vassal is not liable for the casualties attaching to the reserved superiority without express stipulation.

A further point requires attention in cases where lands and teinds are disposed together, and a *cumulo* feu-duty is stipulated for both. In these cases it appears to be settled that one-tenth part of the *cumulo* duty is to be held as effeiring to the teinds, and to be liable in payment of any augmentation of stipend to be imposed after the vassal's entry.²

¹ Cuming, 2d Dec. 1628, and Huntly, 13th Dec. 1628, M. 2764; Erskine, 2d Nov. 1748, M. 2901; Webster, 13th July 1780, M. 2902.

² Dundas, 13th February 1793, M. 14,820; M'Ritchie's Trustees, 26th Feb. 1836, 14 Sh. 578.

But the superior of lands, though drawing a large feu-duty from them, is not liable in assessment for building the parish church. He is not a heritor in the sense of the Act 1663, cap. 21.¹ And, unless there is a special agreement to the contrary, he appears not to be liable for ordinary parochial burdens.² It appears formerly to have been held that the feu-duty was liable to bear a portion of various public and parish burdens, as being just so much of the yearly rent or produce of the lands.³ But the rule is different now.

If the burdens on the lands sold, and on other lands retained, have been paid *in cumulo*, it will be found convenient to specify in this clause the rule for dividing the *cumulo* burdens, or, if possible, to give the actual division between the lands sold and those retained.

We next have the clause of warrandice, in these words—‘ And I grant warrandice ;’ meaning, unless specially qualified, absolute warrandice as regards the lands and writs, and warrandice from facts and deeds as regards the rents. It thus embraces the two separate clauses of warrandice found in the older style,—the one applicable to the lands, and the other to the writs and rents. In ordinary cases, a general clause of warrandice, such as this is in its terms, is construed according to the character of the deed ; being absolute when the grant is for an adequate price ; being from fact and deed, past and future, when, though onerous, the grant is by way of transaction ; and being from future facts and deeds only, when the grant is gratuitous. But under the Statute, whatever be the character of the deed, the clause, if framed as above, will import absolute warrandice of the lands and writs. Where the arrangement of parties, therefore, is that the warrandice shall be different, it is now indispensable that the clause be specially qualified accordingly.

The obligation of warrandice, you will recollect, is not to defend the lands against claims, even if these may lead to eviction, but to make good the loss arising upon eviction after it shall have taken place.⁴ The lands belong to the purchaser, who must defend his own title, and he must make an honest *bond fide* defence. In case of eviction, the purchaser, holding a clause of absolute warrandice, has a claim against the seller for the full value of the lands as at the time of eviction, and to the expense incurred in defending his title,—that is, for the full amount of his loss. But no action lies against the granter of the warrandice until eviction actually takes place. Erskine, however, says that, if a plain ground of distress shall arise, the granter of the charter may be sued instantly,—for example, if there is an incumbrance on the lands to be purged.⁵ Likewise, if the liability of the party against whom the claim lies is disputed, action of recourse may be brought as soon as

¹ Dundas, 2d July 1778, M. 8511.

² Murray, 20th February 1794, M. 15,092.

³ Feuars of Kinross, 7th Feb. 1696, M.

13,071 ; Treasurer of Edinburgh, 25th Feb. 1696, M. 4188.

⁴ Stair, ii. 3. 46.

⁵ Erskine, ii. 3. 30.

eviction is threatened.¹ It is also a clear rule in practice, when eviction is threatened on a preferable right, to intimate the danger to the seller, in order that he may have an opportunity of suggesting any competent defence, or otherwise supporting the title, and protecting against the threatened eviction, if he has any good ground for doing so. But it is no defence to the grantor of the warrandice, that he was not made a party to the suit, unless he can point out a defence competent and omitted.²

PUBLIC
BURDENS.

Even absolute warrandice, however, does not give relief against public and parish burdens imposed or to be imposed by law,—nor against loss arising by fatality,³—nor against servitudes of a common character, and not heavily burdensome.⁴ In all these cases, if it is intended to throw any unusual burden on the seller, an express obligation to the effect agreed on is required, in addition to the ordinary clause of warrandice. It is further settled that even an obligation of relief from teind, minister's stipend, and all public and parish burdens imposed or to be imposed on the lands, except poor-rates, does not authorize a claim of relief from burdens imposed by subsequent Statutes. This is founded on the general principle, that parties cannot be held to have had in view burdens imposed under Statutes not existing at the date of the charter or contract, but only those imposed or to be imposed under the authority of Statutes existing at that date.⁵ The whole Judges were consulted in Scott's case, the report of which contains full reference to the authorities on such questions. But poor-rates, though assessed in terms of the provisions of the Act of 1845, are not a new, but an old burden; and an obligation granted in 1826, in a charter of lands lying in a parish partly burghal, partly landward, to relieve the feuar of all cess, minister's stipend, schoolmaster's salary, and other public burdens furth of the ground feued, was held to cover poor-rates assessed on the feuar as proprietor.⁶ Whether the obligation in that case would have extended to poor-rates on houses erected on the feu by the feuar, was specially declared not to be decided.

TACKS.

Mr. Duff says that tacks, as being protected against singular successors by Statute, and being the prevailing mode of deriving profit from heritage, have been adjudged not to fall under the ordinary clause of warrandice.⁷ That is to say, the existence of a tack, whereby the purchaser is excluded from the actual possession of the lands which he purchases, is no ground of action at the instance of the purchaser against the seller, under the clause or obligation of warrandice; and Mr. Duff refers to two decisions in support of that doctrine. But the cases, which are both of very old date, do not support the doctrine absolutely; and, when there is any lease, it is the invariable practice to make special exception of it from the obligation of warrandice, leaving the purchaser, however, to

¹ Melville, 14th January 1842, 4 D. 385.

² Clerk, 23d June 1681, M. 16,605.

³ Erskine, ii. 3. 23.

⁴ Gordonston, March 1682, M. 16,606.

⁵ Scott, 25th June 1850, 12 D. 1077.

⁶ Lees, 11th Nov. 1857, 20 D. 6.

⁷ Duff's Feudal Conveyancing, p. 89.

avail himself of any ground of objection to the lease which would have been competent to the seller himself. The usual clause, when there are leases, is,—‘excepting always from this warrandice the current tacks or ‘missives of tack of the foresaid lands, for all the years and terms thereof ‘still to run and unexpired; but without prejudice to the said B’ (the purchaser) ‘and his foresaids their right to quarrel and reduce the same ‘on any ground in law not inferring recourse upon the warrandice therein ‘against me or my foresaids, or those whom we represent.’ The above clause ought always to be inserted in cases where there are existing leases.

When trustees under private trust-deeds are the sellers, they are not bound to grant absolute warrandice against themselves individually, even if they have sold with reference to articles of roup, which bear in general terms that absolute warrandice is to be granted. They are bound to grant warrandice on their own part from facts and deeds, and to bind the truster in absolute warrandice; or if, as is usual, the trust-deed contains a clause of absolute warrandice by the truster in their favour, to assign that clause to the purchaser.¹ And the trustee under a private trust for behoof of creditors binds the creditors who are to receive the price of the land sold, absolutely, only to the extent of the sums they respectively receive out of the price.²

Where the warrandice given by the seller upon the sale of lands is from fact and deed only, it implies that there has been a transaction. Mr. Duff says, ‘it is a bargain of hazard;’ accordingly, though eviction shall take place, if the grounds of the eviction are not the fact or deed of the seller, or of some one whom he represents, there is no claim against him upon the warrandice, which is strictly construed.³

We now come to the clause of registration, which, in the new form, CLAUSE OF REGISTRATION. is,—‘I consent to registration hereof for preservation,’ importing, unless specially qualified, ‘a consent to registration and a procuratory of registration in the Books of Council and Session, or other Judges’ books ‘competent, therein to remain for preservation; and also, if for execution’ (which is not the case in the form we are considering), ‘that letters ‘of horning and all necessary execution shall pass thereon upon six days’ ‘charge, on a decree to be interponed thereto in common form.’ The new clause has thus the full import of the old, with the addition that, if for execution, it will warrant diligence on six days’ charge; whereas the old form authorized diligence only on fifteen days’ charge. By the Act 1693, cap. 35, charters by subaltern superiors can bear clause of registration, as well as dispositions; and registration may follow, but only in the Books of Council and Session, and in no other record. This enactment appears to have the effect of qualifying the general clause when it occurs in a charter by a subaltern superior, and of making the clause in

¹ Forbes’ Trustees, 15th June 1822, 1 Sh. 497; Duff’s Feudal Conveyancing, p. 90.

² Read, 19th June 1831, 9 Sh. 925.

³ Craig, Jan. 1732, M. 16,623.

such case available only for registration in the Books of Council and Session.

**PRECEPT OF
SASINE.**

Following the registration clause, we have, in charters granted before the Titles Act of 1858 came into operation, the precept of sasine, which is the executive clause of such charters; that is, the clause directly enabling the disponee to obtain a real right.

In order to transfer lands from one to another, or to give a new party a real right in lands, it is not enough that the former owner shall dis-pone the lands, and that the new owner shall enter to the actual and personal possession of the lands disposed. Before the Titles Act of 1858 came into operation, two things more were necessary: viz,—(1.) the delivery of possession, and (2.) the publication of the disponee's right. The immediate object of the precept of sasine was to accomplish the delivery of possession; but the only mode of publishing the right of the disponee was by placing on record an instrument of sasine in his favour, and the precept was necessary as the warrant of the instrument of sasine. The precept was thus required both for the delivery and publication. Publication only is now required in addition to the disposition, and therefore we no longer meet with the precept of sasine in charters; but we are now considering charters prior to the operation of the Titles Act of 1858.

In the older form, in use prior to the operation of the Conveyancing Acts of 1845, the precept was directed by the proprietor to

, jointly and severally, as his bailies in that part; requiring them to pass to the ground of the lands, and there to deliver to the grantee, or his heirs or assignees, heritable state and sasine, real, actual, and corporal possession of the lands, by delivering to him or them, or his or their attorney, in his or their name, bearer thereof, of earth and stone of the ground of the lands, and all other symbols usual and necessary. The full clause will be found in the Juridical Styles.¹ The precept in the form introduced by the Act of 1845 runs thus:—‘Moreover, I desire ‘any notary-public to whom these presents may be presented, to give ‘to the said B., or his foresaids, sasine of the lands and others above ‘disposed.’ The precept, in the latter form, you will observe, directs delivery of sasine to a particular party, or those in his right, and of particular lands, and thus contains what was the essence of the old. The manner of proceeding only is different; the notary being directed to give sasine, which was the duty of the bailie in the old form; and the appearance on the lands, and delivery of symbols of infeftment to the party or his attorney being wholly dispensed with in the new form. This change was intended to give to the registration of the instrument, following on the precept of sasine, its proper place and weight; and to make the registration legally supersede all else, as it had previously done practically. In either form, however, the precept must contain a distinct and special mandate to give sasine to the disponee, who ought to be clearly pointed out in the clause. In one case,² a

¹ Juridical Styles, vol. i. p. 17.

² Blackwood, 7th Nov. 1740, M. 14,327.

sasine was found null, 'in respect it proceeded on a precept for infeft-
 'ing the representatives of A. and B., without particularly naming and
 'designing them.' The above is the whole report of the case. Professor
 Bell says, it is enough if the party to be infeft shall be sufficiently dis-
 tinguished and identified; and he holds that, upon a precept to infeft
 the heirs of A., without naming the heirs, although the sasine would be
 null if taken in the same terms, yet, if the party infeft is named in the
 instrument, and his character as heir is duly established by a service
 recited in the instrument, the precept and sasine will be good.¹ There is
 no direct decision to the above effect; but I cannot doubt that there may
 be a good and effective precept, without the *nominatim* specification of
 the party to be infeft. The precept must also, either in itself, or by
 reference, point out the lands of which sasine is to be given. A specific
 description is not necessary, but the lands must be so indicated that
 they can with certainty be ascertained and identified. In the case of
 Wallace,² a precept for infeftment in certain lands specified, and all
 other lands belonging to the granter in the shire of Ayr, as enumerated
 in the granter's infeftments, was made use of, by itself, as a warrant for
 infeftment in the lands named in it, and in other lands not named,
 but falling under the description of lands belonging to the granter in the
 shire of Ayr. The granter's infeftments in these other lands, however,
 were not produced to the notary as part of his warrant for the sasine of
 these lands; and the Court held the sasine null as to all the lands
 except those specially named in the precept, 'which was the only war-
 rant produced and published for taking thereof.' The precept of sasine,
 in either form, is only executive, and is overruled by the dispositive
 clause; so that it cannot authorize sasine of a character inconsistent
 with the right given by the dispositive clause. We have seen that
 where lands were disposed to A., and the precept of sasine was in favour
 of B., the infeftment in favour of B. was null. In like manner, if the
 dispositive clause is to A. in liferent, the precept can only be in favour
 of A. in liferent, and so in corresponding cases. It is not necessary
 that the precept shall specify the particular symbols of infeftment to
 be delivered, or shall expressly say that symbols of any kind are to be
 delivered. It is enough if it orders sasine of the lands to be given to
 the proper party.³ The order to give sasine implies an order or warrant
 to do so by the usual and proper means,—that is, by delivery of the
 necessary and proper symbols.

The precept of sasine cannot be assigned by the granter.⁴ In Gam-
 mell's case there was a *mortis causa* deed, with a supplement intended to
 substitute one series of heirs for another; and the proper course would
 have been either to grant a new precept of sasine in favour of the new
 heirs, or to make a nomination of heirs with special reference to the
 precept originally granted.⁵

¹ Bell's Principles, s. 876.

² Wallace, 23d June 1732, M. 6919.

³ Barstow, 18th Feb. 1858, 20 D. 612.

⁴ Gammell, 13th Nov. 1849, 12 D. 19.

⁵ Porterfield, 13th Nov. 1829, 8 Sh. 16;

Mackilligin, 23d Nov. 1855, 18 D. 83.

The charter closes with a testing-clause in usual form.

STAMP-DUTY
ON ORIGINAL
CHARTERS.

The stamp-duty payable in respect of original charters has been affected by one of the recent Stamp Acts. When a price is paid down, as in the case of a sale, there has always been a corresponding *ad valorem* duty, at the same rate as in the case of an ordinary disposition; but, until the passing of the Act 17 & 18 Vict. cap. 83, there was no further stamp-duty in respect of the annual feu-duty; and, if there was no price paid down, the ordinary deed-stamp of £1, 15s. was used, whatever might be the amount of the annual feu-duty. By that Act, however (schedule), feu-charters and feu-contracts were dealt with on the same footing as leases for terms exceeding 100 years; and *ad valorem* duties were imposed with reference to the amount of the yearly feu-duty, in addition to the *ad valorem* duties payable in respect of the price, if any, paid down.

DELIVERY.

The feu-charter, like other deeds *inter vivos*, requires to be delivered during the lifetime of the granter and grantee. In a case where a disposition, which had been judicially produced, but only as an undelivered deed, was borrowed from process, and sasine surreptitiously passed on it, the Court, upon complaint by a party interested, directed a marking to be made on the register that the sasine was judicially challenged, and prohibited the notary from expeding any new sasine.¹ The party who had directed the sasine to be passed had died; otherwise probably the Court would have marked their disapproval of his conduct in some decided form.

CHAPTER V.

COMPLETION OF
DISPONEE'S
TITLE.

WE now proceed to consider the mode of completing the title of the disponee in the feu-charter; and I will first explain the procedure required for that purpose before the Titles Act of 1858 came into operation.

Before the period here referred to, there were three leading requisites to the completion of a grant of lands:—(1.) The disposition of the lands, by the former owner to the new owner. (2.) The delivery of possession, by or on behalf of the former owner, to the new owner. And, (3.) The publication of the new owner's right. The first of these requisites is satisfied by the charter. The second, now rendered unnecessary, was attested by the instrument we are about to examine, viz., the instrument of sasine; and the third, which can now be accomplished by the registration of the charter with warrant of registration thereon, could for-

¹ Gray, 13th Dec. 1838, 1 D. 227.

merly be accomplished only by the registration of the instrument of sasine.

From the earliest times of which we have any record, down to the time when the Titles Act of 1858 came into operation, no grant of land was made effectively without delivery and giving of possession or sasine. The forms of proceeding materially varied, but still delivery was always essential, according to the maxim, '*Traditionibus, non nudis pactis, dominia rerum transferuntur.*' The charter only gave right to the lands and to obtain delivery. It gave, and still gives, only a personal right, the *jus ad rem*. Neither is the disponent thereby divested, nor is the disponent invested. The real right, the *jus in re*, is not transferred merely by the execution and delivery of the charter. And the charter never was effectual in evidence of the delivery. Its purpose was to express the particulars of the grant, and the conditions on which the grant was made. But the charter, as at first introduced, did not even contain, in itself, the warrant for delivery. That warrant was given by the separate precept of sasine. The precept came to be annexed to, or inserted in, the charter; and we have long been in the habit of looking upon the charter and precept as one instrument, which, in a practical point of view, is quite correct. But still the precept has distinct and special functions, which the charter, without the precept, could not accomplish, and cannot now accomplish, although by registration it arrives at the result formerly attainable only through the precept. Without the precept, there was no authority for giving delivery, or for publication; and without it the charter was no better than a personal obligation, authorizing judicial proceedings for obtaining delivery, and making publication, but not, of itself, a warrant for delivery and publication. The notarial instrument of sasine was and is the only evidence of delivery that can be looked at.

At what time the instrument under the hand of a notary-public came into use is not clearly known. Craig explains the reason of its introduction thus:—'The necessity for the introduction of the sasine arose from the want of certainty, and the frauds which occurred in the delivery of possession. Some thought the right of property might be given anywhere, by delivery of staff and baton; others, that possession was given by delivery of keys; some, in open Court only; others out of Court, but in presence of the *pares*. Therefore, that no room for doubt might be left, and to obviate the frauds of bad and idle men, our ancestors determined that there should be actual induction into the ground itself, and upon the ground itself, and that real possession should be made apparent.'¹ Craig thinks the notarial instrument was introduced by James the First of Scotland on his return from England; but we have evidence that it was used in Scotland before that time; and it gradually superseded the bailie's certificate of possession, and became an indispensable part of the feudal investiture.

HISTORY OF
INSTRUMENT
OF SASINE.

¹ Craig, ii. 2. 18, and ii. 7. 2.

This is strikingly expressed by Erskine and Stair. Erskine says, 'After notarial instruments were first used with us, they were not only sustained as full evidence of the vassal's entry into possession, but have been accounted a necessary solemnity for perfecting the feudal right, not to be supplied by a proof either of natural possession or even of that special fact, asserted in all sasines, that the vassal was entered into possession by the superior or his bailie.' Stair observes, 'Though the superior, with a thousand witnesses, should subscribe all the contents of a sasine, it would be of no effect to make a real right without the attest of a notary.' Hence, say these writers respectively, the maxim, '*nulla sasina, nulla terra*.' The solemnities observed on giving sasine underwent alterations in 1845, so great as, in Professor Menzies' words, all but to annihilate the ceremony. These alterations are, for the most part, merely in consistency with the altered form of the precept of sasine, on which we have just had occasion to remark; but the instrument, likewise, was simplified in point of form. As, however, we have to judge of the sufficiency of instruments in both forms, and still have occasionally to prepare instruments in the modern form, it is necessary to examine the old as well as the new; and, in this instance, the examination of the old necessarily comes first, as introductory to the new, indeed essential to the due understanding of it. Erskine, speaking of the instrument of sasine in its older form, defines it as an attestation by a public notary, that possession was given by the superior or his bailie to the vassal or his attorney, by the delivery of the proper symbols.¹ We shall see presently what the appropriate symbols were. On the subject of symbolical delivery in general, and the symbols made use of under different circumstances, you will find an elaborate statement in Professor Menzies' Lectures.² It may here be stated, without going into details, that the symbolical was intended to represent real and actual delivery; and that the symbols made use of appear, in general, to have been selected—(1.) as types of authority or *dominium*, indicating, by their delivery, the transfer of proprietorship, with its rights and powers; or (2.) as being portions or representations of the actual subject, indicating the transfer of the *ipsum corpus*, or of possession; though, certainly, there is not absolute consistency in the selection of the symbols, as applicable to either of these objects. And there is reason to think that convenience was often mainly considered. Thus we find the symbol of a pen employed, to a considerable extent, in early documents, on the occasion of transfers of proprietorship.

CEREMONY OF
GIVING SASINE.

The ceremony, as recorded in the instrument of which we have given Erskine's definition, was as follows:—The new proprietor or vassal, or an attorney on his behalf, accompanied by the former owner, or his bailie on his behalf, appeared on the ground of the lands disposed by the charter, accompanied by a notary-public and two witnesses,—making a party of five in all; and as, in common practice, the former and new

¹ Erskine, ii. 3. 34.

² Menzies, p. 564.

owners did not personally attend, I will assume in my explanation that they were represented by their bailie and attorney respectively. The parties being assembled on the ground, the attorney for the new proprietor produced the charter, which he delivered to the bailie of the former owner, requiring him to execute the mandate contained in the precept of sasine, by delivering sasine of the lands in terms thereof. The bailie received the charter, and handed it to the notary to be read and published,—or, if in Latin, to be read, published, and explained in the English language,—in presence of the witnesses. The notary did as required, and thereupon delivered the charter to the bailie, who, in accordance with the precept of sasine, gave sasine and possession to the new proprietor, by delivering to his attorney earth and stone of the ground of the lands, and any other symbols appropriate to the nature of the subject. The attorney thereupon put a piece of money into the notary's hands, declaring that he took instruments, and calling the witnesses' attention to his doing so. This is thought by Professor Menzies to have inferred a protest and declaration that sasine had been duly delivered, as well as a demand upon the notary to make out a formal instrument of sasine attesting the facts. It is thought by some to have been intended also as an earnest to the notary of his fee. And hence the maxim, '*sine auro, vel argento, nullum instrumentum.*' This concluded the ceremony, all of which took place in presence of the witnesses specially called for the purpose. The notary then wrote out the instrument of sasine, the particular clauses of which we shall now examine in detail; taking the form given in the Juridical Styles,¹ and observing that the order in which they occur corresponds precisely with that of the steps of the ceremony as above detailed.

The instrument begins with a solemn invocation of the Deity—'In the name of God, Amen'—in accordance with a practice first introduced by Justinian, and transmitted through the ecclesiastical notaries appointed by the Pope, or the imperial or royal notaries appointed by emperors or kings, as the case might be.

CLAUSES OF THE
INSTRUMENT.
INVOCATION.

Then follows the mention of the date, by the day, month, and year of God, and likewise the year of the Sovereign's reign. The origin of the specification of the Sovereign's reign, as well as the year of God, in the date, is explained by Craig² and Ross.³ And it is settled that the two dates, when both are stated, must correspond. In one case,⁴ the year of the King's reign, corresponding to the year of God stated, was the 25th, and the instrument said 24th,—which was held to make the sasine invalid. Whether it is essential that both dates be specified is perhaps not absolutely settled. The opinion that both dates are required was stated on the Bench in Lindsay's case. But in the later case of M'Far-

¹ Style Book, i. p. 59.

² Craig, ii. 7. 12.

³ Ross's Lectures, ii. 180.

⁴ Town Council of Brechin, 11th Dec.

1840, 3 D. 216. A similar decision was pronounced in Lindsay, 27th Feb. 1844, 6 D. 771. See also Haig, 11th Feb. 1857, 19 D. 449.

Ian,¹ Lord Curriehill (Ordinary) said that point had not been decided. The sasine in that case did not contain the year of God, and was held not to contain the year of the King's reign. It was accordingly found null, as being in fact without any proper date at all. In connexion with this point we have another case, in which a sasine was objected to, inasmuch as the day of the month of the date was left blank.² The sasine bore to be passed on the day of September 1808, and it was recorded on 22d September 1808. The objection was repelled by a special interlocutor, in respect no question of deathbed, bankruptcy, or competition of creditor depended on the decision. But Baron Hume, in his report, says, 'This was not an unanimous judgment. A reclaiming petition was ordered to be answered, and the case did not return for further advising. If the month were not specified, it might be objected that the sasine may not have been recorded within the sixty days. But is not the day of infestment one of the natural and distinctive characters of this public and solemn act, and, as such, necessary to be set forth?' It cannot, therefore, be regarded as a settled point that a sasine, with the day of the month in which it is passed left blank in it, is a valid instrument.

SASINE GIVEN
ON THE LANDS.

It is next said, that in presence of the notary and witnesses the attorney and bailie respectively appeared upon the ground of the lands. It was absolutely essential that the ceremony should be performed on the ground of the lands, and that the instrument should say so. And the notary's written assertion, duly attested, is not lightly to be set aside. It was found not relevant to allege, at the distance of twelve years, that the ceremony had not been performed on the lands, but on a contiguous spot of land at a few yards' distance.³

WHO MAY
OFFICIATE AS
NOTARY?

As regards the notary, any one may officiate who has no interest in the transaction; and when on the subject of bills of exchange we had occasion to see that, whilst interest made an objection, relationship did not. It can hardly be held as absolutely settled, however, that a notary is excluded from acting, even when the ceremony to be attested is in execution of his own precept of sasine. His attestation is an official act, to which he is specially called as a public officer by the holder of the warrant. In the case of Sim,⁴ Lord Gillies gave a distinct opinion, that a notary could act in such circumstances; and the point does not appear to have been adverted to by the other Judges, here or in the House of Lords, to which the case went on appeal. The notary's right to act, however, in such cases, appears to be now more doubtful than it was, because of the provisions of the Titles Act of 1860. As regards burgage lands, that Act provides that the town-clerk can competently act in expediting and recording conveyances, instruments of sasine, and other writs, notwithstanding that he may be personally interested therein

¹ M'Farlan, 2d June 1853, 15 D. 708.

² Dickson's Trustees, 15th Dec. 1820, 723.

Hume 925.

³ Campbell, 9th June 1819, Hume

⁴ Sim, 2d Dec. 1831, 10 Sh. 85.

(sect. 26). But this Act applies only to the case of town-clerks, not to that of other notaries; and there is clear ground for making a distinction between the cases. The town-clerk alone can act as to burgage lands; and, were he disqualified, an application to the Court of Session would be necessary for the appointment of a town-clerk *pro hac vice*. But as to feudal subjects, any notary can competently act; there is no excuse for a party acting in his own case; and, as the Act of 1860 might have been extended to all notaries, and was not, it would seem advisable to reject a sasine of feudal subjects when the precept was granted by the person who had officiated as notary, and to require a supplementary title.

The attorney's appearance is first announced, and it is said that his power of attorney was sufficiently known to the notary-public. The notary was entitled to hold that any man in possession of the charter, or other warrant for giving the sasine, was duly empowered to act as attorney. Of course, however, it was, and always must be, open to the party, as in Gray's case formerly cited, to instruct that the alleged power was surreptitiously assumed, and to object to the sasine passed without authority accordingly. Any man might act as bailie in that part, for giving the sasine on behalf of the superior.

The attorney and bailie required to be correctly named and designed. What constituted a sufficient designation, was always a question of circumstances; the essential requirements being that the individual should be so described as to be clearly distinguished from all other individuals. Where there was no allegation that there was any other individual to whom the designation given could apply, a designation, which in certain circumstances would have been insufficient, was found sufficient.¹ The bailie was here described as 'Brown in Dubbs, parish of Stevenston,' etc.; but, on the principle stated, the sasine was sustained.

The instrument next bears that the attorney produced the charter, which it narrates so far as to set forth clearly and distinctly the three following particulars; viz,—the granter, the grantee, and the subjects disposed. It is indispensable that there shall be no ambiguity as to these particulars; and as the precept of sasine, in general, only refers to the designation of the parties, and the description of the lands, as already given in an earlier part of the charter, without repeating any designation of the parties (besides their names), or any description of the lands, the instrument required to recite so much of the previous contents of the charter as was necessary to make the precept intelligible. What was required for that purpose was to show who were the parties, what were the lands, and that there was a corresponding precept of sasine in the charter. It was the practice, in Craig's time, to insert the whole charter *ad longum* in the instrument of sasine; but that was long ago departed from, and the narrative of what was essential substituted. The precept, however, being the immediate warrant, with the testing-clause containing

WHO MAY
OFFICIATE AS
ATTORNEY AND
BAILIE?

DESIGNATION
OF ATTORNEY
AND BAILIE

NARRATION OF
CHARTER AND
PRECEPT.

¹ Morton, 10th Dec. 1828, 7 Sh. 172; affirmed 26th Nov. 1830, 4 Wil. & Sh. App. 379.

the date, and the subscriptions of the party and witnesses, were always *verbatim* inserted. The date of the charter was not usually specified in the recital of the charter contained in the instrument of sasine, but only referred to as specified in the precept. When the charter had been registered for preservation before sasine was taken, it was usual and right to set forth the date of registration as an important particular connected with the identification of the warrant. But, where the warrant was otherwise sufficiently identified, and the testing-clause, containing the date of the warrant, was correctly engrossed, an error in stating the date of registration was held no objection to the validity of the sasine.¹ The Lord Justice-Clerk Hope says, '*Constat de dispositione*.' On this point of identification of the warrant you may refer also to the case of Gordon.² There is an old case in which a sasine was sustained, though not containing an engrossment of the precept on which it proceeded.³ But the report bears that it would have been otherwise in a competition; and that, if the notary had been alive when the case was before the Court, he would have been deprived of his office. And universal practice has established it as a rule (rendered imperative by the Act of 1845, as to instruments of sasine in the form authorized by that Act), that the precept should be inserted. When the precept contained a description of the lands, and not a mere reference to the description in the dispositive clause, and where the sasine was intended to complete a real right as to a part only of the lands contained in the precept, it was held sufficient to insert only as much of the precept as related to the lands of which the real right was to be given.⁴ But, even in such cases, the correct and usual practice was to engross the whole precept. The testing-clause of the charter, which follows the precept, was always engrossed in the sasine as well as the precept. In contracts of excambion, or mutual dispositions, of old date, we sometimes find the precept of sasine applicable to the disposition by the one party in the middle of the deed, and before the disposition in favour of the other party; consequently, quite apart from the testing-clause. In these cases, the precept of sasine and testing-clause, though apart, ought still to have been both inserted in the instrument of sasine.

CLAUSE OF
DELIVERY OF
SASINE.

The clause of delivery of sasine bears that the bailie, by virtue of the precept and of his office, gave and delivered to the grantee heritable state and sasine, real, actual, and corporal possession of the lands, by delivery of earth and stone of the ground thereof, and other symbols, if such were required. The object of the instrument is to attest that the right, granted by the dispositive clause, has been made real by delivery to the grantee; and, where the charter was of the full right of fee or property, a sasine, which did not bear that heritable state and sasine, real, actual, and corporal possession was delivered, was held invalid,

¹ Gordon's Trustees, 17th July 1851, 13 D. 1381.

² Gordon, 9th March 1827, 6 Sh. 550.

³ Lady Lamertoun, 23d Dec. 1680, M. 14,309.

⁴ Don, 4th Feb. 1813, F. C.

notwithstanding the delivery of the symbols appropriate to the disposition of the full right.¹ This judgment, however, was pronounced by a small majority of the whole Court; and, though the principle which it supports is quite clear, it appears equally clear that there are no *verba solennia* indispensable to instruct that the requisite delivery and possession were given.

It was always essential, however, that the appropriate symbols should be actually delivered; and though it was enough, in the precept of sasine, to give an order generally for delivery of all symbols, usual and necessary, or simply to order sasine to be given without saying anything as to symbols, it was indispensable that the particular symbols delivered should be specified in the instrument, otherwise it would have been left to the notary to judge what were the symbols necessary. The instrument, as an *actus legitimus*, requires to show that every solemnity was observed. The symbols were—

SYMBOLS OF
DELIVERY.

For land, and all its accessories: earth and stone.

A mill, when a separate tenement: the clap and happer.

Salmon-fishings: the net and coble.

Teinds: a handful of grass and corn.

Right of ferry: an oar and some water.

The right of patronage of a parish church: a psalm-book and the keys of the church.

An annual rent of money, leviabie out of lands: a penny.

An annual rent of grain: a parcel of the grain.

Mr. Ross advised the use of both money and grain in the case of the sasine of an annual rent of grain; and, in practice, it was not unusual to deliver the symbols applicable to the lands, or other subjects, out of which the annual rent was upliftable, as well as the money or grain. Thus, an annual rent of money, payable out of lands and teinds, would have for symbols a penny, earth and stone, and grass and corn; but the penny, in such case, would appear to have been enough. In regard to houses held burgage, the symbols were so far different, that, when the sasine was in favour of an heir on his being served, the symbols were hasp and staple, representing the command of the door of the house, or sometimes both hasp and staple and earth and stone; the latter symbolical of actual delivery, and both instructing possession. We have early decisions in which sasines have been sustained though the appropriate symbols were not delivered, in respect of a *communis error*; but for a long time back the appropriate symbols have been absolutely required; and when, in a sasine of lands, the symbol of stone only, in place of earth and stone, was made use of, the sasine was held void.²

The clause specifying the taking of instruments is in these words,—

CLAUSE SPECIFYING THE
TAKING OF IN-
STRUMENTS.

¹ Davidson, 14th Nov. 1827, 6 Sh. 8.

² Town Council of Brechin, 11th Dec. 1840, 3 D. 216.

'asked and took instruments in the hands of me, notary-public,'—that is, the attorney required of the notary the formal and authentic instrument to attest the performance of the ceremony and the delivery of the sasine and possession, in due and accustomed manner.

HOOR WHEN
SASINE GIVEN.

We have then a summary statement, that these things were so done upon the ground of the lands, and duly and lawfully in all points, between specified hours of the day of the date of the sasine. The object of specifying the hours was to show that the ceremony (which was intended to give publicity to the infestment) was done by daylight; and the universal practice was to take infestment between sunrise and sunset, and to make the instrument show that such had been done. But in an old case,¹ a sasine, which had confessedly been taken during the night, was sustained, there being no allegation of fraud. And in another case,² a sasine, dated 21st June, and bearing to be passed between five and six o'clock, was sustained, though it did not say whether before or after noon; because at that time of the year there was daylight between these hours both in the morning and evening.

WITNESSES.

Next is the specification of the names and designations of the witnesses, who are said to be specially called and required. These words, Professor Menzies says, had reference to the time when witnesses were unable to write, and their presence was not proved by their signatures, and required, therefore, to be attested by the notaries.³

DOCQUET.

And lastly, the Latin docquet was annexed, setting forth the notary's name and diocese; and his appointment by Royal authority and by the Lords of Council and Session; that he was present whilst all that was expressed in the instrument was spoken, done, and transacted; and that he saw, knew, and heard that these things were so done and spoken, and took a note thereof, from which he had compiled the instrument of sasine. He specified whether the instrument was written by his own or another's hand, or partly by his own, partly another's; the number of pages of which the instrument consisted; the marginal additions, deletions, etc., if any; and that he had marked and subscribed the instrument with his ordinary mark, name and surname, having been asked and required thus to testify to the faith, strength, and testimony of all and sundry the premises. The docquet required to be holograph. The instrument might be written by any one.⁴ The instrument of sasine was seldom authenticated by more than one notary, and it does not appear ever to have required the subscription of more than one. By the Act 1579, cap. 80, the subscription of two notaries was required to all obligations of importance; but by the subsequent explanatory Act 1584, cap. 4, the enactment of 1579 was declared not to be 'extended to

AUTHENTICA-
TION OF IN-
STRUMENT.

¹ Arnot, 19th Nov. 1679, M. 14,332.

² Dennistoun, 16th Nov. 1824, 3 Sh. 285.

³ Menzies, p. 576.

⁴ The notary to Prince Charles' (afterwards King Charles the First) sasine of

the Lordship of Dunfermline, as heir of Queen Anne his mother (1619), makes an apology for not writing the sasine, thus: 'hoc presens publicum instrumentum manu alienâ fideliter scriptum me alias occupat exinde confeci,' etc.

'instruments of sasine, whereunto ane faithful notar with ane reasonable number of honest and famous witnesses is sufficient.' The reason of this is, that instruments of sasine proceed upon warrants, themselves duly authenticated;¹ or, in the case of burgage sasines in favour of heirs, upon formal cognition and service. Instruments of sasine are nothing without their warrants, except in the cases of instruments on precepts from Chancery and precepts of *clare constat*, and which have special privileges, as being effectual without their warrant, by Act of Parliament. In regard to the number of the witnesses required, the Act of 1584 is not express; but in the case of the Bishop of Aberdeen² the Court 'found no necessity of more than two witnesses in a sasine;' and the universal rule in practice was to have two. It will be recollected that the Act 1681, cap. 5, declares that none but subscribing witnesses shall be probative in instruments of sasine, and requires the witnesses to be designed in the body of the instrument, on pain of nullity. At the date of that Act, all instruments of sasine were written on the face or broadside of a single sheet of parchment, which was very inconvenient; in Erskine's words, 'it became hard for the writer or reader to manage it;' and the Act 1686, cap. 17, was in consequence passed, whereby, for the more easy and commodious perusal of such instruments, it was ordained, 'that it shall be lawful for parties, if they think fit, to cause 'write and extend their sasines by way of book; the attestation of the 'notar condescending upon the number of the leaves of the book, and 'each leaf being signed by the notar and witnesses to the giving of the 'sasine.' The proviso, that the notary's attestation or docquet should condescend upon the number of the leaves, was, however, for a long time little observed; and the Court, after at first sustaining the objection to a sasine that it wanted this solemnity, altered their decision upon a review, in respect there was a *communis error*.³ For a similar reason, the like decision was pronounced in the case of Clark.⁴ The Lords, however, on 17th January 1756, passed an Act of Sederunt, by which, erroneously narrating the Act 1696, cap. 15, as applying to sasines (whereas it applies to private deeds, and the Act 1686, cap. 17, is that regarding sasines), they appointed 'the regulation contained in the Act of 1696 to 'be punctually observed in all time coming, and that every instrument 'of sasine, written bookwise, after the 12th day of June 1756, should 'have every page marked by the number of *first, second, third*, etc.; and 'that the notary's docquet, subjoined to the sasine, should mention the 'number of pages of which the sasine consists,' under the pain of nullity. This Act of Sederunt, though showing a want of due care in its preparation, placed the law on a clear footing. But it was not made *de solennitate* to mention the number of the pages when the instrument

¹ Erskine, iii. 2. 15.

³ Roxburgh, 4th June 1741, M. 14,332.

² Bishop of Aberdeen, 15th July 1680, M. 3011.

⁴ Clark, 7th Feb. 1715, M. 14,333, and App. *voce* Sasine, No. 1.

was only on one sheet. Accordingly, when the instrument consisted of only one page, and it was stated to be written '*super hanc, et duas precedentes paginas,*' that obvious inaccuracy was held not to vitiate it.¹ And a sasine, written on three pages of a single sheet of parchment, was sustained, though the number of the pages was not mentioned in the docquet.² Moreover, an obviously clerical error as to the number of the pages was found not to render a sasine null.³ The sasine was written on nine pages, and the notary's docquet described it as consisting of only eight. But each of the pages was numbered, and in the docquet the notary referred to an erasure on the 17th line of the 8th page, in terms which demonstrated that the error was clerical only. The notary ought always to subscribe each page of the instrument. But a sasine consisting of fourteen pages, all of which were signed by the notary, except the 2d, 4th, 6th, and 8th, was considered valid; the Statute not requiring each page, but each leaf, to be signed.⁴ The notary, you will recollect, ought to make use of the particular subscription adopted by him on admission to his office, adding the initial letters, descriptive of his office, 'N. P.,' and, to his last subscription, prefixing the motto adopted by him at admission, consisting of a Latin word or short sentence, such as, '*veritas,*' '*præmissa attestor.*' The witnesses to sasines in the old form required to sign each page, adding, as in the case of private writs, the word 'witness' to each subscription. The reason for their signing each page was, that they attested not the mere subscription of the notary, but the facts set forth in the instrument. Sasines subscribed by the witnesses on the last page only have, no doubt, been sustained by the Court in old cases. But any sasine written on more than one sheet, and not signed by the notary and witnesses on each leaf, should be rejected. The Act of 1681 requires the designation of the witnesses to be inserted in the instrument of sasine; and, in reference to the manner of designing or describing them, the same rules are to be observed as in the case of private deeds. In the case of Stewart,⁵ an instrument of sasine was sustained where the witnesses were named in it 'Moor' and 'Garvoch,' in place of 'Moir' and 'Garrock,' as they signed; but this judgment has been held questionable by lawyers of high authority. With reference to the marking of each page at the top, sasines have been placed on precisely the same footing with private writs, by the Act 19 & 20 Vict. cap. 89, which having a retrospective effect, it is unnecessary to examine the operation of the previous law on that point. The mention of the name of the writer was not matter of solemnity, and seldom took place, except when the notary wrote the whole instrument in his own hand. When the instrument was written partly by the notary, partly by another, the fact was stated generally, but no specification was given of the part written by each. An objection,

¹ Morrison, 16th December 1826, 5 Sh. 150.

² Kirkham, 21st May 1822, 1 Sh. 423.

³ Dickson, 3d March 1827, 7 Sh. 503.

⁴ Carnegie, 26th Feb. 1796, M. 8858.

⁵ Stewart, 2d March 1815, F. C.

that material words had been written by the notary himself, though he described the deed as written by another, was repelled.¹ With regard to the essentials of the docquet, the omission of the words, '*quia vidi, scivi, et audiui*,' was found to annul the instrument;² likewise, the omission was found fatal of the words—'*Dum, sic ut præmittitur, dicentur, agerentur, et fierent, una cum prænominatis testibus, præsens personaliter interfui, eaque omnia et singula præmissa*, etc.'³ But mere errors in grammar are not material.⁴

Hitherto we have been considering the case of sasines containing only one subject, and requiring only one ceremony of delivery of symbols. But there were many cases in which separate or repeated ceremonies were indispensable. These occurred where there was no erection into a barony, or clause of union and dispensation from the Crown; and where—

WHEN
SEPARATE
CEREMONIES
NECESSARY.

1. There were two or more parcels of land lying detached from each other. The delivery necessary being of the lands themselves, and on the ground of the lands themselves, it could not be said that such delivery took place by means of a single act or ceremony, if one part of the lands lay, for example, in the county of Edinburgh, and the other in that of Fife. Where the lands were discontinuous, therefore, it was necessary to perform the ceremony first on the one parcel, and then on the other. There were in fact two sasines, though they happened to be attested in only one instrument.

2. A separate act of infeftment was requisite also, even when the lands lay contiguous, if different portions of them were held of different superiors. The lands, in such case, were feudally separate tenements, and the ceremony had to be performed on each parcel.⁵

3. Lands contiguous, though holding of the same superior, required separate sasines, if the one portion was held in feu, and the other in blench-farm.⁶ In this case, likewise, they were separate feudal tenements.

4. Separate acts of infeftment were requisite also though the subjects were contiguous, and holden of the same superior, and by the same tenure, when different portions of the subjects had been acquired from different vassals.⁷ In this case also the lands, though naturally contiguous, were feudally separate tenements.

In all these cases the instrument required to show that the ceremony, already described, was duly performed on each of the subjects; for which purpose, it bore that the parties appeared on the ground of the lands, 'respectively and successively, the one after the other;' and that the necessary procedure took place on the ground of the several lands accordingly. Separate acts of infeftment were necessary also when the sasine contained the teinds of the lands, or mills as separate tene-

¹ Dickson, 24th Feb. 1801, M. App. Tailzie, No. 7.

² Primrose, 22d December 1612, M. 14,326.

³ Mackintosh, 17th November 1825, 4 Sh. 190, correcting the decision in the

older case of Maxwell, January 1680, M. 16,837.

⁴ M'Ghie, 5th June 1827, 5 Sh. 758.

⁵ Erskine, ii. 3. 44.

⁶ *Ibid.*

⁷ Bank of Scotland, July 1729, M. 16,404.

ments and not mere accessories, or salmon-fishings, or rights of patronage, or other subjects for which earth and stone were not the appropriate symbols. The symbols for teinds were delivered on the ground of the lands; those for mills within the mills; for fishings at the fishing station; and for rights of patronage within the parish church.

ERECTION OF
BARONY AND
CLAUSE OF
UNION.

But where the lands, with or without teinds, fishings, etc., had been erected into a barony, the erection united the whole into one feudal tenement, and made one sasine, by delivery of earth and stone only, on any part of the barony sufficient, for the whole barony, whatsoever it comprehended. And, independently of erection into a barony, the Crown, in granting a charter to a vassal of any number of separate feudal tenements, had power to dispense, and in practice usually did dispense, with the necessity of separate sasines for each, and to declare that one sasine, to be taken on any part of the lands contained in the charter, by delivery of earth and stone only, without any other symbol, should be sufficient for the whole lands, teinds, fishings, etc., contained in the charter, although consisting of separate tenements, or otherwise naturally requiring separate sasines and different symbols. This dispensation, which was granted by the Crown in every Crown charter as matter of course, if asked for, remained effectual as to lands contained in the charter and not disposed of, notwithstanding the disposition of a portion of the united lands.¹ And, though a valid clause of union could not be granted by a subject,² unless confirmed by the Crown,³ the union and dispensation, when granted by the Crown, became a quality inherent in the lands, and passed with them, though not specially assigned.⁴ It was also, when so granted, communicable to a sub-vassal.⁵ And it was available to support the sasine of a right in security, as well as of an absolute right.⁶ I have here only further to notice the case of sasine of the Crown's grant of Nova Scotia to the Viscount Stirling, for which, by royal dispensation, sasine was allowed to be taken at the gate of Edinburgh Castle.

SASINE *propriis*
manibus.

Before entering on the subject of the registration of instruments of sasine, I will notice shortly the sasine *propriis manibus*, which is a remnant of the proper investiture; that is, the sasine given by the superior himself on the ground of the lands. Where such sasine followed on the warrant in a formal deed containing both a dispositive clause and precept of sasine, the only difference in point of form was, that in place of narrating the appearance of the bailie in that part, as the sasine in ordinary circumstances did, it narrated the appearance of the disponent, who himself performed what in other cases was done by his bailie; the clause of delivery bearing that sasine was given

¹ Montgomerie, 2d March 1813, F. C.

² Aitken, 16th Jan. 1623, M. 16,397.

³ Borthwick, 26th Jan. 1636, M. 16,401.

⁴ Heron, 14th Feb. 1771, M. 8684.

⁵ Blairquhen, 22d Jan. 1637, M. 16,401.

⁶ Wood's Trustees, 6th July 1832, 10 Sh. 773; affirmed 25th March 1834, 7 Wil. & Sh. App. 147.

by the disponent *ex propriis suis manibus*. In such cases, the precept of sasine did not require to be engrossed in the instrument, because the dispositive clause expressed what was granted, and the disponent was himself to act; and it would have been incongruous to insert in the instrument a mandate by him to his bailie. But where the warrant of the sasine was a precept of *clare constat*, or a precept from Chancery following on a special retour (neither of which writs contains a dispositive clause), the precept required to be inserted, as containing the only evidence of the particular subjects of the sasine.¹ Sasines, however, were very rarely so given, except in the case of liferent rights by husbands to wives; on which occasions there was seldom any antecedent warrant in favour of the wife. The sasine in her favour was usually incorporated with a sasine in favour of the husband; and the instrument was precisely in the same form as in an ordinary case, down to the clause of delivery of sasine to the husband inclusive. The narrative of the husband's infestment being completed, the instrument proceeded to state that the husband, being infest, did *ex propriis suis manibus* give liferent infestment, state, and sasine, to his wife, by delivery of the appropriate symbols to her, or to an attorney on her behalf; whereupon she, or her attorney, took instruments in the hands of the notary in presence of the witnesses. In cases where there was an antecedent warrant, the party giving the infestment did not require to subscribe the instrument along with the notary. Where there was no such warrant, the party's subscription was essential; otherwise the sasine would have been rested simply on the assertion of the notary. The subscription of the party operated as a disposition, and, on principle, it should have been authenticated with all the solemnities applicable to the execution of such a deed. But the Court did not apply so strict a rule to sasines of this class by husbands to their wives. A liferent sasine, *propriis manibus*, by a husband to his wife, was sustained, though the husband's signature was not attested. The fact of his having given sasine was held to be attested by the notarial instrument; and this, on proof of being according to a general practice, was held sufficient.² Again, a testing-clause, with reference to the husband's signature, was found not essential, in the case of Anderson.³ Here, however, the granting of the liferent had been acknowledged by the husband in a separate deed. The party was in use to sign each page of the instrument. When the witnesses to his subscription attested the fact of his having given the sasine, they also signed each page. When they merely attested his subscription, they signed the last page only.

¹ Supplement to Spottiswoode, Note (d) p. 227.

² Kibble, 4th Dec. 1804, M. 14,314.

³ Anderson, 31st Jan. 1828, 6 Sh. 463.

CHAPTER VI

REGISTRATION
OF SASINES.

I NOW proceed to the subject of the registration of instruments of sasine for publication ; and I think I may say that publication, by means of the records, is the distinguishing feature of the system of land-rights in Scotland. Other countries have the feudal system ; but, unless in South Australia, under an Act passed in 1857, there is probably nowhere else a general plan of compulsory publication of the titles to land. And, though the Scottish system commends itself by its simplicity and facility of adaptation, the object which stands before all others in any system of land-rights would be wanting, if we had not in our records the element of security of title. Mr. Ross says,—‘ No circumstance distinguishes the jurisprudence of Scotland from the other European nations more than their early invention of public registers ; all our writers on the law have plumed themselves upon this circumstance, and recommended the improvement to their neighbours.’¹ He then quotes Sir George Mackenzie, writing on the same subject in this strain :—‘ Some inventions flourish more in one country than another ; nature allowing no universal excellency, and God designing to gratify every country he hath created ; so Scotland hath, above all other nations, by a serious and long experience, obviated all fraud by their public registers.’ How far our system is entitled to the honourable character of an ‘ invention,’ may well be doubted. But, even if our ancestors should not be entitled in this respect to the special distinction which belongs to first inventors, yet we should not be over-sparing of acknowledgments to them for having had the good sense to recognise what was valuable in the institutions of any other country, and to give us the benefit of a good and sound system, wherever they could fall in with it.

HISTORY OF
REGISTERS.

The first approach to a register of land-rights with us is to be seen in the protocols kept by notaries, who were taken bound to enter therein the instruments made by them. These books, however, were most irregularly kept. We have then various Statutes which were designed to give the Crown the means of saying who were its vassals, but which were therefore limited to the purpose of exhibiting the sasines of parties holding lands of the Crown. Then we have, in 1599, a Statute requiring registration of instruments of sasine in a register, to be called the Secretary’s Register, within forty days, on pain of nullity, and establishing local registers.² The provisions of this Act were renewed and extended by an Act passed in 1600 ;³ and these two Acts contain substantially the provisions of the leading Statute now in force. On account, however, of the clamours raised against the system, the Acts of 1599 and 1600 were repealed by an Act passed by the Convention at Edinburgh on 27th January 1609, ratified by Act of Parliament in the same year.⁴

¹ Ross’s Lectures, i. 92.² Stat. 4. 184.³ Stat. 4. 237.⁴ Stat. 4. 449.

But these clamours were not allowed long to prevail over the good sense 1617, c. 16. and spirit of the Scottish Parliament. For registration was again prescribed by the Act 1617, cap. 16; and the system thereby established, though it has undergone important amendments in detail, and is still open to much improvement, especially in the way of having the records made more accessible, speaks for its own efficiency, in the fact that now, nearly two hundred and fifty years after its institution, and whilst substantially the same as on its institution, no one desires to supersede it. Every proposed amendment, whilst suggesting new adaptations, assumes that the system is to remain in principle as heretofore. The Act of 1617 proceeds on a recital of the frauds arising through the existence of latent private rights; and, for prevention thereof, ordains a public register to be kept, in which all instruments of sasine, and all reversions and discharges, or assignations thereof, shall be registered within threescore days of their date, under pain of making no faith in prejudice of third parties. The register is placed under the charge of the Lord Clerk-Register, whose deputies were to receive, register, mark, and re-deliver the writs.

The Act further established a General Register in Edinburgh, and particular or local registers throughout Scotland, giving parties the option of resorting to the Register at Edinburgh, or the appropriate Particular Register; and official extracts from these registers were declared equally probative with the principal writs, except in case of improbation, that is, where forgery was alleged. The Act expressly enjoined the engrossment of the whole body of the writs; but there was great laxity in the observance of that regulation, and the remedy at first applied betrayed an entire misconception of the object of a register as intended for public security. This was by the Act 1686, cap. 19, which 1686, c. 19. enacted that when writs were presented to the keepers, and delivered back bearing an attestation that they were registered, this should make them sufficient for the parties' security, although they should not be inserted in the register. But, as registration was required only for public security, the proceeding, as here sanctioned, was incompatible with that object. It had regard simply to the private parties; for them, however, the mere charter and sasine were just as good as the charter and sasine with an attestation of registration, and no real registration. The Act of 1686 was virtually a repeal of that of 1617; as no one could tell from the records what sasines there might be in the hands of private parties unbooked, but yet valid and sufficient by virtue of the keeper's attestation. The Act of 1686, therefore, was speedily rescinded by that of 1696, cap. 18. 1696, c. 18. 18, which declared that no sasine or other writ should be of force against any but the granters or their heirs, unless duly booked in the register. An irregularity was still practised, in omitting to insert the notary's docquet, annexed to every sasine; and the Act of Sederunt of 17th January 1756, *inter alia*, required the full sasine, and particularly the full docquet, to be booked, on pain of nullity.

Due provision was thus made for inserting in the register the

entire instrument of sasine. For the convenience of those searching the register for writs affecting any particular lands, it was necessary to have some abstract of the contents of the writs so booked ;

1672, c. 16. and, by the Act concerning the regulation of the Judicatories, 1672, cap. 16, sect. 32, the Keepers of the Registers of Sasines were appointed to make exact minute-books, containing the names, surnames, and designations of the parties, and the common designation of the lordship, barony, or tenandry, of the several lands mentioned in the writ. But the system was still defective, inasmuch as, whilst requiring registration, it did not absolutely give preference, in cases of competition, to priority of registration. Of two sasines, both recorded within sixty days of their respective dates, the last recorded was preferable, if first in date ; and thus parties might be excluded by a sasine recorded after they had searched the register, and found it clear of competing title or incumbrance. Moreover, there was no defined plan of securing that the keepers of the registers should insert the writs presented to them at the time and in the order of presentment. Nor could any one tell, by inspecting the registers or minute-books, what writs were in course of registration, and what not ; because there was no evidence as to writs in the hands of the keepers, and not booked. The minute-book, appointed by the Act of 1672, was not necessarily in advance of the register. It might follow it. To correct these evils, the Acts

PRIORITY OF REGISTRATION.

1693, c. 13 & 14. 1693, caps. 13 & 14, were passed ; the former giving preference according to priority of registration, and the latter appointing the keepers of the registers to keep minute-books of all writs presented, expressing the day and hour of presentment, and the names and designations of the presenters ; which minutes were to be immediately signed by the presenter and also by the keeper, and patent to all the lieges. The Act further ordained that the writs should be registered exactly conform to the order of the minute-book.

This enactment completed the system, which thus embraced a register containing every sasine *verbatim*, and a minute-book containing the date and hour of presentment of every sasine for registration, with the leading particulars of the writ ; and which gave preference of title or security according to priority of registration alone. There can be no doubt that, on account of the multiplicity of the writs in rapidly extending localities, even the minute-books have long been cumbrous, and in need of classification and re-arrangement ; but the system affords the elements of security, which is the main object in all cases ; and we have good reason to hope that ere long a well-matured scheme will become law, whereby the registers will be made more easily accessible, and more available for their proper objects, and the system will be brought up to the reasonable requirements of the day.

The Acts above detailed are not applicable to sasines of lands in royal burghs held by burgage tenure ; as to which, however, by separate Acts, a similar system has been established ; the records, in

that case, being under the charge of the town-clerks of the burghs respectively.

The effective nature of the system of registration, as here explained, led to the great alterations and amendments introduced in regard to sasines, by the Act 8 & 9 Vict. cap. 35, most correctly entitled, 'An NEW FORM OF SASINE. Act to simplify the form and diminish the expense of obtaining infestment in heritable property in Scotland;' and which came into operation on 1st October 1845. It had long before been settled that registration was the point on which all questions of preference in competitions should depend; and it had come to be the general opinion of sound practical men, that registration alone was required in order to infestment, and the publication of rights in or affecting lands. The above Act, accordingly, made registration not merely publication but infestment; and, whilst reserving the option of taking the older forms, and still requiring an instrument of sasine, it stripped the instrument of all that was not essential to accomplish the object of infestment and publication by means of the registers. For these ends, the Act did away with the necessity of proceeding to the lands, or of performing any Act of infestment thereon; declaring sasine to be effectually given by producing to a notary-public the warrants of sasine, and relative writs, as then in use, to be produced at taking infestment; and by expediting and recording, in the General or appropriate Particular Register of Sasines, an instrument of sasine, setting forth that sasine had been given in the lands, and subscribed by the notary and witnesses, according to the form annexed to the Act. Such form of infestment was declared effectual, whether the lands should lie contiguous or discontinuous, or should be held by the same or different titles, or of one or more superiors, or whether the deed, entitling the party to obtain infestment, should be dated prior or subsequent to the Act, or whether the precept of sasine therein should be in the form theretofore in use, or in the new form already examined, and which was authorized by the Act. Instruments in the new form were to be recorded in manner theretofore in use; and, being so recorded, were to have the same effect as if sasine had been taken, and an instrument of sasine duly recorded, according to the previous practice. Moreover, instruments in the new form might be effectually recorded at any time during the life of the party infest. The instrument, in its new form, bore no date; the date of presentment and entry, set forth on it by the keeper of the record, was to be taken as the date of the instrument and infestment.

These enactments exhibit the changes in principle; and we can now examine the new form of the instrument introduced by the Act of 1845, and which was adapted to these changes.

The instrument opens by specifying the place at which the ceremony and act of infestment are performed.

It is then said that, 'by,' or 'on behalf of,' the party to be infest, the

**PRESENTMENT
OF WARRANTS.**

warrant or warrants were presented to the notary. The word 'by' will be used when the party himself makes the presentment, and the words 'on behalf of,' when another person does so for him. Generally speaking, the notary is entitled to hold the person in possession of the warrants, and who presents them to him, as having sufficient authority from the party to be infeft for obtaining the infeftment. Such person, however, ought to have adequate instructions or power from the party to be infeft. And if the warrants are used improperly the party can obtain redress, under the law as altered in 1845, just as he could under the old law. The instrument, in its new form, does not express by whom the production is made, but that would be matter of proof. Where, however, sasine, in the form of the Act of 1845, is to be passed in favour of an incapacitated person, I think it would be advisable to say that the warrants were presented on behalf of the party and of the guardian, or other person acting for him; or, if the guardian is at hand, he should be got to present, and the instrument would then say there was, 'by (the guardian), on behalf of (the party),' presented, etc.

**NARRATION OF
WARRANTS.**

The warrant is then described by the name and designation of the granter; and by reference to the date, as in the precept of sasine inserted in the instrument. If there are any writs of transmission, or other warrants, they will be described at this place, in the form of a mere inventory, by names and designations of parties and dates; and you will recollect that additional warrants may be necessary, not merely as connecting links in the title between the grantee of the precept and the party to be infeft, but for the purpose of supplementing an original warrant which has only a general or a defective description of the lands. Then follows the more full narrative of the warrant or warrants; and the great points to be attended to in such narrative are (besides, of course, accuracy), to exhibit, as nearly as possible in the form of the Act of 1845, the dispositive or other ruling clause of the only or original warrant; and, if there are several warrants, to connect the party to be infeft with the party to whom the original warrant was granted, by a clear deduction of titles; or, in the case of a warrant with a general or defective description of lands, to bring out explicitly and distinctly all the particulars of the lands to which it relates.

**INSERTION OF
PRECEPT.**

We have next the *verbatim* insertion of the precept of sasine, testing-clause, and signatures. The form scheduled in the Act of 1845 clearly points out that the testing-clause and signatures ought to be engrossed, as well as the proper precept.

**CLAUSE OF
DELIVERY OF
SASINE.**

We have then the clause of delivery in these words,—'In virtue of which precept I hereby give sasine to the said A. B. of the lands and others above described.' This clause is the *sasine*; and, were it omitted in the instrument, all the rest would go for nothing. If there are several warrants, the clause will say, 'In virtue of which precept, and of the other writs presented to me, as aforesaid,' or words to that effect. The clause of delivery, you will observe, contains no specification of the

lands. It speaks simply 'of the lands above described.' Care must be taken, therefore, to see that the description of the lands in which the sasine is given has been clearly and distinctly set forth in the previous part of the instrument. And it must also be seen that the reference in the clause of delivery cannot be extended to more than the infestment is intended to embrace. For instance, if there are several warrants, and the first contains ten acres, and the others only five, the clause of delivery should be limited to the five acres. No doubt, the sasine would not be effectual for more than the lands in the deeds of transmission, if the party infest was not connected with the original warrant by a title comprehending the whole lands; but it would not be accurate conveyancing to speak simply of 'the lands above described,' if there were two descriptions of lands, and one only applicable. The nature of the right of the party to be infest requires also to be attended to; as, for example, in liferent, or in trust, or the like. And here it must be noticed, as applicable to sasines under both the old and the new forms, that whilst no precept authorizes sasine of more than is contained in it,—for example, a precept for infestment in liferent, or subject to redemption, does not authorize sasine in fee, or irredeemably,—yet a precept for infestment in the full irredeemable fee may be made use of for infestment of less than such full fee,—in liferent, for example, or in security, and redeemably.¹

The instrument of sasine, in the form now before us, closes with a AUTHENTICA-
TION. testing-clause, which ought to be framed like that in any ordinary deed; except that it contains no date,—the Act declaring the date of the presentment and entry set forth on the instrument by the keeper of the register, that is, the date of registration, to be the date of the sasine. And the instrument must be signed by the notary and witnesses. The notary signs on each page, adding on the last the words 'Notary Public,' and on each other page 'N.P.,' to his subscription. He ought also, on the last page, to prefix his Latin motto; though the rule of practice in that particular is various, and the prefix seems not essential. The witnesses sign the last page only; each adding the word 'witness' to his subscription, as in the case of an ordinary deed.

Sasines *propriis manibus* do not appear to be in the view of the Act of 1845, the form introduced by which contemplates the giving of sasine only by a notary-public, and in virtue of warrants produced to him.

The system of registration now in force, under the Acts before detailed, applies to sasines in the more modern, as well as the older form, and consists of three particulars; viz,—(1.) The presentment of the sasine by the party, or his agent, to the keeper of the proper register, and entry thereof by the keeper in the minute-book; (2.) The insertion of the writ, *verbatim*, in the register, according to the order of the entry in the minute-book; and (3.) When the writ is booked, a certificate or attestation of the fact is annexed to it, under the hand of the keeper, stating the date of the presentment and entry, or registration; in what book of the

¹ Melvin, 17th June 1843, 5 D. 1217.

register, and on what pages of the book the writ is copied. This certificate being annexed, the writ is given back to the party. As to sasines in the old form,—including, I apprehend, any in that form to be passed, as well as those already passed,—the registration, in order to be effectual, must be within sixty days after date. As to those in the new form, the registration may take place at any time during the life of the party infeft. Under the old form, it could be within sixty days after date, although the party had died; and it could not be after sixty days, although he should be alive. The sixty days are counted by entire days, and not *de momento in momentum*.¹ And, in a case where the instrument was accurately booked, though beyond the sixty days, it was held that the registration was constituted by the presentment of the sasine to the keeper, and his entry in the minute-book, which took place within the sixty days, and not by the actual booking in the register. The sasine was accordingly sustained.²

PREFERENCE BY
PRIORITY OF
REGISTRATION.

And the preference, arising by first entry in the minute-book, is so complete, that where two sasines were presented by the same party, on the same day, and between the same hours,—in fact, were presented *unico contextu*,—although, in the nature of things, it was impossible not to enter the one before the other, the preference was given to the sasine which happened to be first entered in the minute-book.³ That was the case of a security over lands; and to preserve a *pari passu* preference in such cases, in favour of two or more parties, the proper course is to introduce a special clause in each of the deeds, of which you will find forms in the Juridical Styles.⁴ It was usual to enter the date of recording in the register, as well as in the minute-book, though the latter only was a statutory requisite. But, where the sasine was presented and minuted in due time, and certified by the keeper to be recorded accordingly, it was held immaterial that the date of recording, as stated in the register, was beyond the sixty days.⁵

VITIATIONS OF
PRIORITY OF
REGISTRATION.

In a case exactly similar, except that the date of recording as entered in the register was vitiated by erasure, the sasine was held duly recorded.⁶ But, where the sasine had truly been presented and booked on 25th September, but not minuted till 4th October, and the date of recording was vitiated by erasure, both in the register and the certificate, the Court held the sasine not duly recorded.⁷ In several of these cases the keepers of the registers were fined, or otherwise punished. The purpose of the registration being to furnish information on which all concerned may rely, the register must contain a copy of the whole instrument, and be free of all unauthenticated erasures or other vitiations. Accordingly, where the record omitted the word '*primo*' in the year of the date of the sasine, making the year 1820 instead of 1821, the sasine was held unrecorded.⁸ And, where the clause of delivery of sasine went into details,

¹ Lindsay, 27th Feb. 1844, 6 D. 771.

² Maclaine, 16th June 1852, 14 D. 870; affirmed 6th July 1855, 18 D. (House of Lords Reports) 44.

³ Douglas, 21st Feb. 1835, 13 Sh. 505.

⁴ Juridical Styles, vol. i. pp. 601 & 650.

⁵ Maclaine's case.

⁶ Adam, 19th June 1810, F. C.

⁷ Drummond, 24th June 1809, F. C.

⁸ Macqueen, 23d Jan. 1823, 2 Sh. 637.

and in the detail, as recorded, certain lands were omitted, the sasine was held unrecorded as to the omitted lands.¹ But, although the particulars of the date of the sasine were omitted in the body of the record, it was held enough, in a question raised at the distance of sixty-five years from the date of registration, that these particulars had been added in a marginal addition in the handwriting of the party who had booked the instrument, though the marginal addition was not signed.² In these cases, the sasines had been duly entered in the minute-book, and they bore the keeper's certificate of registration, correctly and completely,—which was important when there was any disconformity between the minute-book and the register. But, when the minute-book and register corresponded, an error in the certificate was held immaterial.³ An essential change on this point, however, was made by the Act of 1845; because, by sect. 3, instruments of sasine in the new form bear no date in themselves; and the date of presentment and entry set forth on any such instrument by the keeper of the record are to be taken as the date of the instrument of sasine and infestment. Whether disconformity between the dates, as entered in the minute-book and set forth on the instrument, or vitiation in the certificate, the minute-book being entire, would absolutely annul an instrument of sasine, is a question which we are not called on to decide. But it is manifestly of great consequence that there should be both conformity and integrity; and care ought to be taken to prevent any question on such points from arising in practice. In case of a blundered certificate, it is easy to get a new one correctly written; and this would appear a complete remedy, if required at once. The case might be very different if an interval of time were allowed to elapse.

Sasines in the old form, when not recorded within sixty days of their date, are null to all intents and purposes. There are many decisions by which the law was brought to that point; but it is enough to quote the last in date, in the report of which the whole subject is elaborately discussed.⁴ The question here arises, whether errors in recording sasines can be remedied? As to sasines in the old form, the Court were unanimous in holding that the record could not be altered after the expiration of the sixty days allowed for registration.⁵ But when, in the record-copy of a sasine in the old form, dated and recorded in 1837, the subscriptions of the notary and witnesses were omitted, the Court, upon an application presented by the party nine years afterwards, granted warrant to insert the subscriptions.⁶ This was done, however, on an *ex parte* statement that the petitioner was not aware that any interests of third parties would be affected by the proposed correction. The case not having

CORRECTION OF
ERRORS IN
REGISTRATION.

¹ Grey, 23d Feb. 1790, M. 8796. A similar decision was pronounced in the case of Stewart, 20th Feb. 1827, 5 Sh. 385.

² MacLaine's case.

³ Gibson-Craig, 10th July 1838, 16 Sh. 1332.

⁴ Young, 11th March 1847, 9 D. 932.

⁵ Dundas, 15th December 1824, 3 Sh. 400.

⁶ Duke of Montrose, 17th June 1846, 8 D. 822.

drawn forth any observations from the bench, it cannot be said on what precise grounds the petition was granted, or how far the correction is to be relied on. But, on principle, if the registration of a sasine in the old form could have been corrected within sixty days of its date, it would seem allowable to correct one in the new form at any time during the life of the party infest; reserving all questions of preference or otherwise arising out of the error prior to its correction. There is, however, one remedy at all times sure and complete in such cases, except the single case to be immediately pointed out, as long as the party is alive; viz.,—to proceed *de novo*, on the footing that the sasine not duly recorded is null, and to expedite sasine of new on the original warrant. This was the remedy adopted before the passing of the Act of 1845, in the case of sasines not recorded within the sixty days.¹ There are various cases to this effect; and in the late case of Haig² it is assumed, as beyond doubt, that such a mode of proceeding is competent and sufficient. There is one exception from this rule, however; viz.,—the case of sasines proceeding on precepts from Chancery in favour of heirs. Such precepts contain a special declaration, that after the term of Whitsunday or Martinmas next following their date they shall be of no force. It is therefore incompetent to make use of them for giving sasine *de novo* after one of these terms has passed. In regard to all sasines in the new form, we have special provision in the Act of 1845 itself, which declares, that in case of any error or defect in an instrument of sasine, or in the recording thereof, it shall be competent of new to make and record an instrument of sasine, which shall have effect from the date of recording, as if no previous instrument had been made or recorded.³ This enactment, however, clearly would not validate a new sasine on a Chancery precept after a term of Whitsunday or Martinmas had passed. But, except in that case, we have a clear and undoubted remedy, by expediting a new sasine; or, as we shall presently see, under the Titles to Land Act of 1858, by recording the conveyance in the Register of Sasines. It may here be noticed, also, that there is a convenient course competent in passing sasines in the new form, when the warrants or any of them are recorded, and the extracts or office-copies are wanting, or not at hand. The principal writs being on record, and there being no particular place prescribed for passing sasine, the parties can go to the register, and there present the warrant or warrants to the notary. In that way the expense of new extracts may be saved.

ERASURES IN
INSTRUMENTS
OF SASINE.

I have now only to notice the subject of erasures in instruments of sasine. As regards the legal effect of erasures, instruments of sasine were on the same footing with private deeds, until the passing of the Act 6 & 7 Will. IV. cap. 33; and erasures in essential words, such as the date, or witnesses' names and designations, were fatal to the instrument; and, in

¹ Kibbles, 18th Dec. 1830, 9 Sh. 233, where the opinions of the whole Court were taken; affirmed 23d Sept. 1831,

5 Wil. & Sh. App. 553.

² Haig, 11th Feb. 1857. 19 D. 449.

³ 8 & 9 Vict. c. 35, s. 4.

the names of the lands, fatal so far as regarded the lands as to which the erasure occurred.¹ But, by the above Act, no challenge of any sasine can receive effect, on the ground that any part of the instrument is written on an erasure, unless such erasure be proved to have been made for the purpose of fraud, or the record is not conformable to the instrument, as presented for registration. Instruments of sasine *propriis manibus* are excepted from the enactment; these being equivalent to dispositions and instruments of sasine thereon, in one. The Statute has a retrospect, so as to exclude all actions wherein judgment was not pronounced prior to 12th May 1835; and now, words written on erasure in an instrument of sasine are read as part of the writs, if they appear without vitiation on the record, in the same manner as if there had been no erasure. Erasures in the record annulled the sasine equally as when they occurred in the instrument; and this rule is not altered. The record, therefore, requires to be free of erasure; and any erasure in a material word or clause in the record would be fatal; even if the principal instrument were perfect and entire. The Act, however, applies only to erasures. Vitiations otherwise arising, and marginal additions, are left on the same footing as formerly; and the law regarding them, and the rules as to their authentication, are the same in the case of instruments of sasine as in that of other writs.

I have now to explain the changes introduced by the Titles to Land Acts of 1858 and 1860, in the mode of completing the investiture of the vassal or disponee, and making his right real. In an early stage of the history of land-rights, possession was held to be given to a new owner, and his investiture completed, by symbolical delivery, and the attestation of the fact in an instrument, under the hand of a notary-public, called an instrument of sasine. That mode was found imperfect as a system, because it left so much room for fraud, through the granting of rights privately; and, moreover, it placed too much in the power of the notaries. To remedy these evils, an organic change was necessary, and we find the change made in the institution of the registers for publication. The progress of the system of registration for the above object we have just traced. And though we cannot but admire the caution which at first made registration necessary, not by way of substitute, but as an addition to the ceremony of symbolical delivery, it does seem remarkable that both the symbolical delivery and the registration should have been allowed to remain indispensable for nearly 230 years. It was not, however, until the Infestments Act of 1845 came into operation, that the ceremony of delivery of symbols on the ground of the lands was declared unnecessary. We were not even then, however, advanced so far as to dispense with sasine altogether. A committee of

EFFECTS OF
REGISTRATION
UNDER TITLES
TO LAND ACTS.

¹ Innes, 10th March 1827, 5 Sh. 559; affirmed 20th June 1827, 2 Wil. & Sh. App. 637; Hoggan, 13th Feb. 1835, 13 Sh. 461; affirmed 30th July 1840, 1 Robinson's App. 173; Howden, 10th July 1835, 13 Sh. 1097; Macmillan, 4th March 1831, 9 Sh. 551.

lawyers, embracing among its members the most eminent Scotchmen of the day, had, very shortly before, reported in favour of retaining the instrument of sasine in all cases, as, on the whole, the most suitable medium through which to register or publish rights acquired by disponees. Two only (the late Lords Murray and Cunninghame) recommended, in a class of simple cases, the abolition of the instrument, and the registration of the conveyance instead; but the majority decided in favour of retaining the instrument in a simple form; and, following up their recommendation, the Act of 1845 was passed, doing away with the necessity of going to the ground, or performing any ceremony, and making the instrument of sasine something like a mere notarial certificate. That was a great advance; and again we observe the caution accompanying it of not abolishing the older system, but making the new permissive only, and optional. The value of the instrument of sasine, however, was seen to be very insignificant in a large class,—a very great majority,—of the cases met with in practice; that is, in all cases where it proceeded on one simple warrant. In such cases the instrument was a source of expense, and still more of error, and imperfection of title or security; for it did not always contain and import into the record all the clauses of a charter or disposition which it was the intention of the parties to publish, and the publication of which was required in order to make the rights thereby created real. The registration of the conveyance itself was thus, on several accounts, desirable. The main objections to its registration were, that it would place on record matter which the parties did not wish to publish, and would unnecessarily load the record with clauses of a merely personal nature. The answer to these objections was, that ordinary conveyances, which constitute by far the largest class, contain nothing which the parties have any interest in objecting to place on record, and very little merely personal matter. But, moreover, provision for exceptional cases could easily be made,—and it was better that the exception should bend to the rule than the rule to the exception. Upon considerations such as these, it was determined to abolish the necessity for the instrument of sasine, as part of the title to lands, and to make registration of the conveyance operate as if there had been a recorded sasine; and the proposed change was welcomed by the profession at large in a way that did them great honour. Two practical difficulties had to be met:—(1.) Sasine carries with it important consequences. The claim of a wife to terce depends on the fact, whether her husband was infeft; a charter by a superior cannot be assigned after infeftment is passed on it; and for these, and other reasons, parties may not wish to be infeft, or to have their rights made real. It was therefore considered necessary to secure that the registration of the conveyance should be the act of the party himself, or of some one representing him in the responsible character of agent. (2.) The second difficulty arose from the fact, that conveyances are often granted in favour of two or more parties in liferent and fee, or otherwise with joint rights and interests. It was necessary,

therefore, to give to each of such parties means of being registered, independently of the other; and it was necessary that one party, not desiring to be registered, should be protected against the effect of registration when taking place at the instance of the other. Again, when conveyances are granted to two or more parties, and the survivors and acceptors of them, as trustees, the registration, as for infeftment, ought to show on whose behalf it took place, as the surviving and accepting trustees for the time. To obviate these difficulties, it was resolved that the registration of the conveyance should be effectual only to the parties by whom, or on whose behalf, it was presented for registration. In certain cases, such parties were to be pointed out in a warrant of registration, written on the conveyance, and signed by such parties or their agent; in others, they were to be pointed out in a notarial instrument.

The Titles to Land Act of 1858 accordingly declared, that from and after 1st October 1858, 'it shall not be necessary to expedite and record an instrument of sasine on any conveyance of lands, but it shall be competent and sufficient for the person or persons in whose favour the conveyance is granted, instead of expediting and recording such instrument of sasine, to record the conveyance itself in the register of sasines applicable to the lands therein contained; and the conveyance, being presented for registration with a warrant of registration thereon, in or as nearly as may be in the form of Schedule A, No. 1, hereto annexed, specifying the person or persons on whose behalf it is so presented, and signed by such person or persons, or his or their agent, and being so recorded along with such warrant, shall have the same legal force and effect in all respects, as if the conveyance so recorded had been followed by an instrument of sasine, duly expedite and recorded at the date of recording the said conveyance, according to the present law and practice, in favour of the person or persons on whose behalf the conveyance is presented for registration.'¹ The warrant of registration is a simple order to register on behalf of the party or parties named, by whom, or by their agent, it requires to be signed; the agent, when he acts, giving his designation as 'W.S., Edinburgh,' or 'Writer, Glasgow,' etc., and stating expressly that he is the party's agent. The term 'conveyance' is declared by the interpretation clause to include original charters; and by registering such charters, with warrants of registration in due form thereon, the same effects are now produced in favour of the person or persons by or on behalf of whom the warrant of registration is made out, as would formerly have been produced by expediting and recording an instrument of sasine on the charters in favour of such person or persons.² By sect. 19, conveyances may be recorded at any time in the life of the party, in the same manner as instruments of sasine are recorded. The keepers of the registers are required to record the conveyances accordingly; and the date of entry in the minute-book is declared to be the date of registration. The date of registration of the

¹ 21 & 22 Vict. c. 76, s. 1.

² 21 & 22 Vict. c. 76, s. 36.

conveyance is declared equivalent to the date of registration of instruments of sasine, according to the former law and practice; and extracts from the Register of Sasines are declared to make faith in all cases, in like manner as the recorded conveyances themselves, except where such conveyances shall be offered to be improven; that is, when it is alleged that they are forged. By sect. 31, in case of any error or defect in the recording of any conveyance or warrant of registration in the Register of Sasines in virtue of the Act, it is declared competent of new to record the conveyance, with the original or a new warrant of registration, as the case may require; with the same effect, as from the date of the new registration, as if the conveyance and original warrant of registration had not been previously recorded. This section erroneously made reference to the Sasines Act of 1845,¹ in place of the Heritable Securities Act of the same year.² The section was therefore repealed, and its provisions re-enacted, with the reference to the Act of 1845 correctly made, by the Titles Act of 1860.³

**CORRECTION OF
ERRORS IN RE-
GISTRATION.**

The registration of the conveyance, with the warrant thereon, is thus placed, in every respect, on the same footing as the registration of the instrument of sasine; and the means of obviating errors in the original warrant, or in the registration of the conveyance or warrant, are exactly similar to those available in the case of the instrument. If there is an error in the warrant, the course is to write a new warrant, just as, in former practice, we should have written a new instrument of sasine, and to record the conveyance anew with the new warrant, as formerly we should have recorded the new instrument of sasine. If the error is in the registration only, then we simply record, of new, the conveyance and old warrant, as if there had been no previous registration. You will keep in view, however, that the conveyance itself requires to be free of intrinsic nullities just as much as formerly; so also must the warrant of registration be. Registration of the conveyance and warrant is now equivalent to expeding and recording an instrument of sasine; but the authentication of the conveyance itself remains on the same footing as before, and the warrant must be duly authenticated. Erasures in ordinary instruments of sasine were, by the Act 6 & 7 Will. IV. cap. 33, made harmless, if the record was entire; and the provisions of that Act are, by the Titles to Land Acts 1858, sect. 33, and 1860, sect. 19, extended to sundry instruments authorized by these later Acts; but the rules as to the conveyances themselves remain unaltered, for reasons too obvious to call for any explanation.

**NOTARIAL
INSTRUMENTS.**

The provisions, above explained, are intended to meet all ordinary cases. But, as it will frequently happen that the conveyance of lands is contained in a deed granted for further purposes and objects, such as a marriage-contract, deed of trust, or deed of settlement; and, in such cases, it is desirable to record no more than the part containing the proper conveyance; sect. 2 declares it competent and sufficient in such

¹ 8 & 9 Vict. c. 35.

² 8 & 9 Vict. c. 31.

³ 23 & 24 Vict. c. 143, ss. 18, 35.

cases to expedite and record a notarial instrument, setting forth generally the nature of the deed, and containing, at length, those portions of it by which the lands are conveyed, and by which real burdens, conditions, or limitations are imposed. The same section also allows of a notarial instrument in the case of a deed conveying separate lands, or separate interests in the same lands, to the same or different persons. In such cases, also, it is declared not necessary to record the whole deed, but competent and sufficient to expedite and record a notarial instrument, setting forth generally the nature of the deed, and containing at length the part or parts by which particular lands are conveyed to the person or persons in whose favour the notarial instrument is expedite, and the part which specifies the nature and extent of the right and interest of such person or persons, with the real burdens, conditions, and limitations, if any. The form of the notarial instruments, in these two cases, is given in the schedule (B) annexed to the Act of 1858. But it will be kept in view, that this section (2) is confined in its operation to cases where the deeds are granted for further purposes and objects besides being merely conveyances of lands, and cases where separate lands, or separate interests in the same lands, are conveyed to the same or different persons. Except in such cases, the party in whose favour the conveyance is granted appears not entitled to make use of a notarial instrument for publishing his right. He can only proceed by registering the conveyance in his favour; and the above section (2) does not apply to cases where the original warrant has merely been transmitted to a new proprietor. The use of the notarial instrument, in the above cases, appears to be preferable to that of the instrument of sasine; because, whilst the effects of both are the same, the notarial instrument is shorter and simpler.

The only other sections of the Acts of 1858 and 1860, which I have to notice at this stage are sect. 3 of the Act of 1858, and sect. 25 of that of 1860, as to a clause of direction. We have seen that portions of a deed, such as a marriage-contract, can be placed on record by means of a notarial instrument. The object of sect. 3 of the Act of 1858 is to authorize the registration of portions of a deed without notarial instrument or the intervention of a notary. For that purpose the section provides that, immediately before the testing-clause of any conveyance, it shall be competent to insert a clause of direction, specifying the part or parts of the conveyance which the grantor thereof desires to be recorded in the Register of Sasines; and, when such clause is so inserted, the keeper of the register is appointed to record such part or parts only, together with the clause of direction and testing-clause. The section thereupon declares the recording of such part or parts of the conveyance, with the clause of direction and testing-clause, and the warrant of registration, to have the same legal force and effect as if a notarial instrument, containing such part or parts of the conveyance, had been duly expedite and recorded in favour of the party on whose behalf the conveyance is presented. It is at the same time declared competent for the party entitled to present the con-

CLAUSE OF
DIRECTION.

veyance for registration to record the whole conveyance, or to expedite and record a notarial instrument, in the same manner as if the conveyance had contained no clause of direction ; and, where a notarial instrument is expedite, no part of the conveyance directed to be recorded is to be omitted from the instrument. The relative schedule (C) contains a form for the clause of direction, which directs the registration to begin with the commencement of the deed, so as to give the name and designation of the grantor ; and, of course, the name and designation of the grantee also, the description of the lands, any real burdens, conditions, etc., will be ordered to be recorded, so as to place on record all the particulars which would be specified in a notarial instrument, and which are necessary to make the partial registration intelligible and complete in itself. For this purpose it will be convenient, in framing the deed which contains the clause of direction, to throw together, in consecutive clauses, and at the commencement of the deed, all the parts to which the clause of direction is to be applicable. Though the Act of 1858 made no provision on the subject, it was usual, in good practice, when taking advantage of the clause of direction, to frame the warrant of registration in such terms as these : 'Register on behalf of A. B., in terms of the within written clause of direction.' But, not unfrequently, no notice of the direction was given in the warrant of registration ; and, the clause being immediately before the testing-clause, the whole deed might be engrossed before the clause of direction was observed. It is accordingly provided by the Act of 1860, sect. 25, that, when the deed contains clause of direction which is to be acted on, the warrant of registration shall refer to it in such terms as these : 'Register, in terms of clause of direction, on behalf of A. B.,' etc., as in an ordinary case ; and, in the absence of such express reference, the deed is to be engrossed as if there were no clause of direction.

I have only further to remark here, that the changes introduced by the Act of 1858 are, like those authorized by the Act of 1845, optional only. The Act of 1858, by sect. 20, is expressly declared not to prevent the use of the forms previously employed.

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register, and on what pages of the book the writ is copied. This certificate being annexed, the writ is given back to the party. As to sasines in the old form,—including, I apprehend, any in that form to be passed, as well as those already passed,—the registration, in order to be effectual, must be within sixty days after date. As to those in the new form, the registration may take place at any time during the life of the party infeft. Under the old form, it could be within sixty days after date, although the party had died; and it could not be after sixty days, although he should be alive. The sixty days are counted by entire days, and not *de momento in momentum*.¹ And, in a case where the instrument was accurately booked, though beyond the sixty days, it was held that the registration was constituted by the presentment of the sasine to the keeper, and his entry in the minute-book, which took place within the sixty days, and not by the actual booking in the register. The sasine was accordingly sustained.²

PREFERENCE BY
PRIORITY OF
REGISTRATION.

And the preference, arising by first entry in the minute-book, is so complete, that where two sasines were presented by the same party, on the same day, and between the same hours,—in fact, were presented *unico contextu*,—although, in the nature of things, it was impossible not to enter the one before the other, the preference was given to the sasine which happened to be first entered in the minute-book.³ That was the case of a security over lands; and to preserve a *pari passu* preference in such cases, in favour of two or more parties, the proper course is to introduce a special clause in each of the deeds, of which you will find forms in the Juridical Styles.⁴ It was usual to enter the date of recording in the register, as well as in the minute-book, though the latter only was a statutory requisite. But, where the sasine was presented and minuted in due time, and certified by the keeper to be recorded accordingly, it was held immaterial that the date of recording, as stated in the register, was beyond the sixty days.⁵

VITIATIONS OF
PRIORITY OF
REGISTRATION.

In a case exactly similar, except that the date of recording as entered in the register was vitiated by erasure, the sasine was held duly recorded.⁶ But, where the sasine had truly been presented and booked on 25th September, but not minuted till 4th October, and the date of recording was vitiated by erasure, both in the register and the certificate, the Court held the sasine not duly recorded.⁷ In several of these cases the keepers of the registers were fined, or otherwise punished. The purpose of the registration being to furnish information on which all concerned may rely, the register must contain a copy of the whole instrument, and be free of all unauthenticated erasures or other vitiations. Accordingly, where the record omitted the word '*primo*' in the year of the date of the sasine, making the year 1820 instead of 1821, the sasine was held unrecorded.⁸ And, where the clause of delivery of sasine went into details,

¹ Lindsay, 27th Feb. 1844, 6 D. 771.

² Maclaine, 16th June 1852, 14 D. 870; affirmed 6th July 1855, 18 D. (House of Lords Reports) 44.

³ Douglas, 21st Feb. 1835, 13 Sh. 505.

⁴ Juridical Styles, vol. i. pp. 601 & 650.

⁵ Maclaine's case.

⁶ Adam, 19th June 1810, F. C.

⁷ Drummond, 24th June 1809, F. C.

⁸ Macqueen, 23d Jan. 1823, 2 Sh. 637.

and in the detail, as recorded, certain lands were omitted, the sasine was held unrecorded as to the omitted lands.¹ But, although the particulars of the date of the sasine were omitted in the body of the record, it was held enough, in a question raised at the distance of sixty-five years from the date of registration, that these particulars had been added in a marginal addition in the handwriting of the party who had booked the instrument, though the marginal addition was not signed.² In these cases, the sasines had been duly entered in the minute-book, and they bore the keeper's certificate of registration, correctly and completely,—which was important when there was any disconformity between the minute-book and the register. But, when the minute-book and register corresponded, an error in the certificate was held immaterial.³ An essential change on this point, however, was made by the Act of 1845; because, by sect. 3, instruments of sasine in the new form bear no date in themselves; and the date of presentment and entry set forth on any such instrument by the keeper of the record are to be taken as the date of the instrument of sasine and infestment. Whether disconformity between the dates, as entered in the minute-book and set forth on the instrument, or vitiation in the certificate, the minute-book being entire, would absolutely annul an instrument of sasine, is a question which we are not called on to decide. But it is manifestly of great consequence that there should be both conformity and integrity; and care ought to be taken to prevent any question on such points from arising in practice. In case of a blundered certificate, it is easy to get a new one correctly written; and this would appear a complete remedy, if required at once. The case might be very different if an interval of time were allowed to elapse.

Sasines in the old form, when not recorded within sixty days of their date, are null to all intents and purposes. There are many decisions by which the law was brought to that point; but it is enough to quote the last in date, in the report of which the whole subject is elaborately discussed.⁴ The question here arises, whether errors in recording sasines can be remedied? As to sasines in the old form, the Court were unanimous in holding that the record could not be altered after the expiration of the sixty days allowed for registration.⁵ But when, in the record-copy of a sasine in the old form, dated and recorded in 1837, the subscriptions of the notary and witnesses were omitted, the Court, upon an application presented by the party nine years afterwards, granted warrant to insert the subscriptions.⁶ This was done, however, on an *ex parte* statement that the petitioner was not aware that any interests of third parties would be affected by the proposed correction. The case not having

CORRECTION OF
ERRORS IN
REGISTRATION.

¹ Grey, 23d Feb. 1790, M. 8796. A similar decision was pronounced in the case of Stewart, 20th Feb. 1827, 5 Sh. 385.

² MacLaine's case.

³ Gibson-Craig, 10th July 1838, 16 Sh. 1332.

⁴ Young, 11th March 1847, 9 D. 932.

⁵ Dundas, 15th December 1824, 3 Sh. 400.

⁶ Duke of Montrose, 17th June 1846, 8 D. 822.